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N. 2929 No. 14676

United States
Court of Appeals
for the Ninth Circuit

SOUTHERN PACIFIC COMPANY a Corpora-
tion, Appellant,

vs.

JOHN BLAZIN, Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern
District of California, Southern Division

FILED

APR 18 1955

PAUL P. O'BRIEN, CLERK

No. 14676

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SOUTHERN PACIFIC COMPANY a Corpora-
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States, Northern District of California, Southern Division

No. 33,178

JOHN BLAZIN,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,
Defendant.

COMPLAINT FOR DAMAGES AND DEMAND
FOR JURY TRIAL

Comes now the plaintiff John Blazin, complains of the defendant above named, and for cause of action alleges that:

I.

At all times herein mentioned defendant Southern Pacific Company was and now is a corporation organized and existing under and by virtue of the laws of the State of Delaware, and said defendant at all times herein mentioned was and now is engaged in the business of a common carrier by railroad in interstate commerce in the City of Oakland, County of Alameda, State of California.

II.

At all times herein mentioned defendant Southern Pacific Company, a corporation, was a common carrier by railroad engaged in interstate commerce and plaintiff was employed by defendant in said interstate commerce and the injuries sustained by him hereinafter complained of arose in the course

of and while plaintiff and defendant were engaged in the conduct of said interstate commerce.

III.

This action was brought under and by virtue of the provisions of the Federal Employers' Liability Act, 45 U.S.C.A., Sec. 51, et seq., and the Federal Safety Appliance Act, 45 U.S.C.A., Sec. 1, et seq.

IV.

On or about September 15, 1952, plaintiff was employed by defendant as a yardman and member of a switching crew, which was engaged in switching operations in the defendant's North Passenger Yard in the City of Oakland, County of Alameda, State of California.

V.

At said time and place defendant maintained a certain passenger car in violation of the Federal Safety Appliance Act, in that one of the grabirons was missing therefrom. At said time and place it became and was the duty of plaintiff to take a position on the side of said car for the purpose of operating a cutting lever in order to operate the coupling mechanism of said car, and as plaintiff reached for the grabiron of said car, said grabiron was missing, and plaintiff was caused thereby to be thrown, striking his back against the adjoining car. As a direct and proximate result of the violation by said defendant of the Federal Safety Appliance Act, as aforesaid, plaintiff sustained the following personal injuries, to-wit:

Acute cervical sprain; bilateral parascapular strain; contusions and straining of the low back; injury to the wrist; and severe shock and injury to his nervous system. By reason of said injuries and each of them, plaintiff was made sick, sore and disabled, and plaintiff is informed and believes and therefore alleges that said injuries and each of them are permanent in character.

VI.

As a direct and proximate result of the carelessness and negligence of defendant, as aforesaid, plaintiff herein has been generally damaged in the sum of \$30,000.00.

VII.

As a direct and proximate result of the said carelessness and negligence of said defendant, as hereinabove alleged, and solely by reason thereof, plaintiff has been under the care of physicians and surgeons, and has incurred and will continue to incur liability for medical services necessary to the treatment and relief of his said injuries in amounts not determined or ascertainable at this time, and plaintiff prays leave that when said amounts are ascertainable, he may be permitted to amend this complaint and insert said amounts herein.

VIII.

Prior to the happening of said accident, plaintiff was an abled bodied person capable of and in fact earning approximately \$450.00 per month as a yardman. As a direct and proximate result of the said

carelessness and negligence of defendant, plaintiff was for a period of four months unable to engage in his usual or any gainful occupation, to his damage in the sum of \$1800.00. Plaintiff will be for an indefinite period of time in the future unable to pursue his regular occupation or any other gainful occupation, and plaintiff prays leave of Court that when the amount of said damages suffered by him by reason of his inability to pursue his regular employment or any employment becomes known to him, he be permitted to amend this complaint in order that he may set forth said sum or sums, together with appropriate charging allegations.

Wherefore, Plaintiff Prays Judgment against the defendant above named, in the sum of \$31,800.00; for his costs of suit herein incurred; and for such other and further relief as to the Court seems just and proper.

/s/ JESSE NICHOLS,
/s/ NICHOLS, RICHARD, ALLARD &
WILLIAMS,
Attorneys for Plaintiff

A trial by jury of all of the issues herein is hereby demanded by plaintiff.

/s/ JESSE NICHOLS,
/s/ NICHOLS, RICHARD, ALLARD &
WILLIAMS,
Attorneys for Plaintiff

[Endorsed]: Filed November 16, 1953.

[Title of District Court and Cause.]

ANSWER

Comes Now, Southern Pacific Company, a corporation, the defendant in the above entitled action, and answering the complaint of plaintiff on file herein, shows as follows:

As and for a First, Separate and Independent Answer and Defense to the complaint, the defendant Southern Pacific Company shows as follows:

I.

Admits and avers as follows:

1. At all times mentioned in the complaint and herein, defendant Southern Pacific Company was, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, doing business in the State of California and in other states, and engaged, among other activities, in the business of common carrier by railroad for the transportation of freight and passengers in interstate and intrastate commerce in said State of California and in other states, and in the City of Oakland, County of Alameda, State of California.

2. On September 15, 1952, plaintiff was employed by defendant Southern Pacific Company as a yardman in a switching crew which was engaged in switching operations in defendant Southern Pacific Company's West Oakland passenger yard in

the City of Oakland, County of Alameda, State of California.

3. At said time and place, a certain passenger car which was being switched by said switching crew was not equipped with a vestibule hand hold on the right side of a vestibule entrance at the B end.

4. At said time and place, plaintiff made claim that he had been injured.

5. At said time and place, plaintiff was earning such sums as were normally earned by a yardman employed by defendant Southern Pacific Company at said time and place, and upon the trial of this action, proof of the exact amount thereof, less deductions required by law, will be made.

II.

Defendant Southern Pacific Company is without knowledge or information sufficient to form a belief as to the truth of the averments of the complaint in respect of plaintiff's conduct and in respect of the existence, nature and extent, if any, of plaintiff's injuries, and in respect of medical services and expenses received and incurred by plaintiff, if any, and in respect of plaintiff's physical condition prior to the happening of the accident averred by plaintiff in his complaint. Defendant Southern Pacific Company denies each and every averment in the complaint except as hereinabove admitted or otherwise denied. Defendant Southern Pacific Company denies the averments of paragraphs I, II, III, IV, V, VI, VII and VIII of the

complaint, except as hereinabove admitted or otherwise denied. Defendant Southern Pacific Company denies that plaintiff has been damaged in the sum of \$31,800, or in any lesser sum, or in any sum at all.

As and for a Second, Separate and Independent Answer and Defense to the complaint, defendant Southern Pacific Company shows as follows:

I.

Defendant Southern Pacific Company here repeats and avers all of the matters set forth in paragraph I of the first answer and defense above and incorporates them herein by reference the same as though fully set forth at length.

II.

Defendant Southern Pacific Company is informed and believes and upon such ground avers that at said time and place and on said occasion, plaintiff was negligent in the premises and in those matters mentioned in the complaint; negligently conducted himself in and about and in respect of said West Oakland passenger yard, said passenger car, and said vestibule entrance of said passenger car; negligently conducted himself in and about and in respect of the side of said passenger car mentioned in the complaint; and negligently performed his duties as a yardman at the time and place and on the occasion mentioned in the complaint, with the result that he was injured. Said conduct of plaintiff, are aforesaid, proximately caused and con-

tributed to the accident averred in the complaint; to the injuries, if any there were, suffered by plaintiff; and to the damages, if any there were, averred by plaintiff.

As and for a Third, Separate and Independent Answer and Defense to the complaint, defendant Southern Pacific Company shows as follows:

I.

Defendant Southern Pacific Company here repeats and avers all of the matters set forth in paragraph I of the first answer and defense above and incorporates them herein by reference the same as though fully set forth at length.

II.

Defendant Southern Pacific Company is informed and believes and upon such ground avers that at said time and place and on said occasion, plaintiff was negligent in the premises and in those matters mentioned in the complaint; negligently conducted himself in and about and in respect of said West Oakland passenger yard, said passenger car, and said vestibule entrance of said passenger car; negligently conducted himself in and about and in respect of the side of said passenger car mentioned in the complaint; and negligently performed his duties as a yardman at the time and place and on the occasion mentioned in the complaint, with the result that he was injured. Said conduct of plaintiff, as aforesaid, was the sole cause and the sole

proximate cause of the accident averred in the complaint; of the injuries, if any there were, suffered by plaintiff; and of the damages, if any there were, averred by plaintiff.

Wherefore, defendant Southern Pacific Company, a corporation, prays that plaintiff take nothing by his complaint on file herein; that defendant Southern Pacific Company have judgment for its costs of suit incurred herein; and for such other, further and different relief as, the premises considered, is proper.

/s/ A. B. DUNNE,

/s/ DUNNE, DUNNE & PHELPS,

Attorneys for Defendant

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 7, 1954.

[Title of District Court and Cause.]

VERDICT

We, the Jury, find in favor of the Plaintiff, and assess the damages against the Defendant in the sum of Twenty-Three Thousand and Fifty Dollars (\$23,050.00).

/s/ JOHN JOSEPH BONALANZA,

Foreman

[Endorsed]: Filed November 23, 1954.

In the United States District Court for the Northern District of California, Southern Division

No. 33,178—Civil

JOHN BLAZIN,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,
Defendant.

JUDGMENT ON VERDICT

This cause having come on regularly for trial on November 22, 1954, before the Court and a Jury of twelve persons duly impaneled and sworn to try the issues joined herein; Jesse Nichols, Esq., appearing as attorney for the plaintiff, and Michael Mesner, Esq., appearing as attorney for the defendant, and the trial having been proceeded with on November 22 and 23, in said year, and oral and documentary evidence on behalf of the respective parties having been introduced and closed, and the cause, after arguments by the attorneys and the instructions of the Court, having been submitted to the Jury and the Jury having subsequently rendered the following verdict, which was ordered recorded, viz:

“We, the Jury, find in favor of the Plaintiff and assess the damages against the Defendant in the sum of Twenty-three Thousand and Fifty Dollars (\$23,050.00). John Joseph Bonalanza, Foreman,” and the Court having ordered that judgment be entered herein in accordance with said verdict and for costs;

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that said plaintiff do have and recover of and from said defendant the sum of Twenty-three Thousand Fifty and No/100 (\$23,050.00), together with his costs herein expended taxed at \$91.80.

Dated: November 24, 1954.

C. W. CALBREATH,
Clerk

/s/ By MARGARET BLAIR,
Deputy Clerk

[Endorsed]: Entered and Filed November 24,
1954.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR NEW TRIAL

To the Plaintiff Above Named and His Attorneys:

You Are Hereby Notified that on Monday, the 13th day of December, 1954, at the hour of 10:00 a.m. on said day, or as soon thereafter as counsel can be heard, or at such time as the Court may fix, if it do fix another time, the defendant Southern Pacific Company, a corporation, by its attorneys, will move the above entitled Court, the Division thereof presided over by Honorable Edward P. Murphy, a Judge of said Court, at the courtroom of said Court and Division, United States

Post Office Building, Seventh and Mission Streets,
San Francisco, California, as follows:

I.

1. For an order agreeable to Rule 59 of the Federal Rules of Civil Procedure vacating and setting aside the verdict and judgment herein and granting the defendant Southern Pacific Company a new trial. Attached hereto, marked "Exhibit A" and herein incorporated is a draft of the order which defendant proposes.

2. Said motion will be made upon this notice of motion and upon all of the records, papers and files herein, including a transcript of the testimony and proceedings had upon the trial, including the charge and instruction of the Court and the ruling of the Court on the instructions.

3. Said motion will be made upon the following grounds and each of them severally:

(a) The verdict is against the law.

(b) The verdict is against the weight of the evidence.

(c) The verdict is contrary to the evidence.

(d) The evidence is insufficient to sustain the verdict.

(e) The verdict is excessive.

(f) The verdict is against the weight of the evidence and is not sustained by the evidence in that the verdict is excessive and in that it is excessive

the verdict is contrary to the evidence and to the weight thereof.

(g) The verdict is excessive and appears to have been given and was given under the influence of passion and/or prejudice.

(h) Errors of the law occurring at the trial and duly objected and excepted to and particularly in the giving of instructions, to which defendant objected and excepted, and rulings upon the admission of evidence, said instructions and rulings withdrew certain issues from the consideration of the jury.

/s/ A. B. DUNNE,

/s/ DUNNE, DUNNE & PHELPS,
Attorneys for Defendant

EXHIBIT "A"

ORDER

Southern Pacific Company, a corporation, having duly moved the above entitled Court to vacate and set aside the verdict and judgment herein and grant to said defendant Southern Pacific Company, a corporation, a new trial, and the matter having been heard and submitted to the Court, and all of the parties having appeared upon the making and hearing of said motion, and the Court having considered the same and being advised in the premises, it is

Ordered, Adjudged and Decreed that the verdict and judgment herein be, and they are hereby, vacated and set aside and a new trial of this action

is hereby granted to defendant Southern Pacific Company, a corporation.

Done in open court this.....day of....., 1954.

.....,

United States District Judge

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 2, 1954.

[Title of District Court and Cause.]

ORDER

Defendant moves for a new trial on two grounds:

1. Excessiveness of the Verdict.

I recognize that the trial judge is not a mere arbiter but the question of the amount of damage is primarily for the jury. While the amount of the verdict may be relatively large, it is not so large as to shock the court's conscience or sense of justice. It will not be set aside.

2. Applicability of the Safety Appliance Act.

At the close of all the evidence, I took from the jury the question of the applicability of the Safety Appliance Act and instructed that if the admitted absence of the grabiron caused the plaintiff's injury, the jury should find for the plaintiff. During the course of the trial I excluded certain evidence, but I believe that the defendant presented the crux of its case on this point, perhaps in not as dramatic or full sense as it desired, but the skeleton was

clearly defined. Defendant contends the instruction was error.

Viewing the evidence most favorably to the defendant, it shows this. The car Charlottesville was not equipped with a right-hand grabiron which is customarily used by yard men to support them when bending over to uncouple cars. The Charlottesville had been on a track in the Railroad's switching yard that is used both for storage and repair. It had been there "out of service" for some 13 days prior to the accident. A bad order tag had not been placed on the car, but it had undergone some minor electrical repairs unrelated to the missing grabiron. In the course of switching the Charlottesville from this track to the heavy repair track, the plaintiff, a member of the yard crew, was injured while uncoupling the Charlottesville from a string of cars. The Charlottesville and the other cars were moving at the time of the injury. It was to be uncoupled from the rest and carried by its momentum to the heavy repair track.

I held that under those facts Section 4 of the Safety Appliance Act (45 USCA sec. 4) applied as a matter of law. Section 4 provides in pertinent part:

"* * * it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grabirons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars." (Emphasis added.)

The defendant contends that there was evidence from which the jury might find that the Charlottesville was not "in use". The argument must be that it was not "in use in interstate commerce". The defendant interprets these words to mean that if the car was out of service and undergoing repairs even though being moved incident to repair it is not "in use".

It is quite clear that when a car is withdrawn from service, at rest and in the process of repair, the Safety Appliance Act does not apply. *New York C. & St. L. R. Co. vs. Kelly*, 70 F.2d 548 (7th Cir. 1934); *Sherry vs. Baltimore & Ohio R. Co.*, 30 F.2d 487 (6th Cir. 1929); *Baltimore & Ohio R. Co. vs. Hooven*, 297 Fed. 919 (6th Cir. 1924); *Netzer vs. Northern Pac. Ry. Co.*, 57 N.W. 2d 247 (Minn. 1953); See the Boiler Inspection Act cases: *Tisneros vs. Chicago & N. W. Ry. Co.*, 197 F.2d 466 (7th Cir. 1952); *Lyle vs. Atchison T. & S. F. Ry. Co.*, 177 F.2d 221 (7th Cir. 1949); *Compton vs. Southern Pac. Co.*, 70 C.A. 2d 267, 161 P. 2d 40 (1st Dist. 1945).

This is highly sensible. If the carrier is to comply with the Act, defective equipment must be repaired. On the other hand, the Act is designed to protect railroad employees. These conflicting interests must be reconciled. The statute itself makes a start. If a car which has been properly equipped, but becomes defective while being used on the carrier's line and is in the process of being hauled from the place where the "equipment was first discovered to be de-

fective * * * to the nearest available point where such can be repaired" the criminal penalties provided by the Act do not apply, but the Act does apply in civil actions. (45 USCA sec. 13).

It is in the middle area, between these two points, where the difficulties arise. First the statute—Section 4 sets up a specific requirement for grabirons "for greater security to men in coupling and uncoupling cars". The applicability here differs from that of other sections of the Act which apply to "use on its lines" (45 USCA secs. 11, 23) or "used in moving interstate traffic" (45 USCA secs. 1, 2, 17) or "used in interstate traffic" (45 USCA 5). Use on the line or in moving traffic is certainly more restrictive in application than use in interstate commerce. See *Compton vs. Southern Pacific Co.*, 70 C.A. 2d 267, 161 Pac. 2d 40 (1st Dist. 1945). This car was in use in interstate commerce in a constitutional sense. The lack of a grabiron here caused an injury during the very operation—uncoupling—which the requirement of a grabiron was specifically designed to cover. The defendant would read the statute:

"* * * it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grabirons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars unless the coupling or uncoupling is done incident to switching the car from one repair point to another". (Emphasis added.)

Even though the defendant superimposes these

words on the words "to use in interstate commerce", I do not believe that this section of the Act was meant to be so restricted.

Merely taking the car "out of service" for the purpose of making repairs does not make the Act inapplicable. *Texas and Pacific Railway vs. Rigsby*, 241 U.S. 33, 36 Sup. Ct. Rep. 482 (1916). In *Rigsby*, a defective car had been placed out of service marked with a "bad order" tag and was waiting on a spur track for some days. The repair shops were on the opposite side of the main track from the spur track. A member of the yard crew was injured while the defective car was being switched with some other "bad order" cars to the main track preparatory to switching them to the repair shops.

The critical question here is whether Section 4 of the Act applies in switching a car removed from service, from a spur track, where minor repairs unrelated to the defect which caused the injury are made, to another place of repair. The cases, in their language at least, make the question of whether the car has reached the repair point as determinative of the applicability of the Act. If it has they say the Act is inapplicable. If it has not but is rather "in the process of being removed to the repair point", the Act is applicable. But these cases uniformly discuss the problem in relation to Section 11 of the Act which is applicable where a carrier "haul[s] or permit[s] to be hauled or used on its line" a defective car. Even *Kaminski vs. Chicago M. St. P. & P. R. Co.*, 180 Minn. 519, 231

N. W. 189 (1930) which involves a defective grab-iron used in uncoupling cars talks as if Section 11 were the applicable section.

It may be that a car on a repair track for the purpose of repairs or in a yard used exclusively for repair is not "used on its line" but this is a wholly different thing from whether such a car is in "use in interstate commerce".

In any event, these cases, with the possible exception of the Minnesota case—Kaminski, do not cover the situation before me. The factual situation here differs from Rigsby in that there no repairs had been made on the spur. Is this critical?

Some federal courts have read Rigsby as based on the theory that intermediate shifting at the repair point yard is part of a unitary journey to the precise point of actual repair and therefore within Section 13 which would make the Act applicable in civil actions. *M'Calmont vs. Penn. R. R.* 283 Fed. 736 (6th Cir. 1922); *Sherry vs. Baltimore & Ohio R. R. Co.*, 30 F. 2d 487 (6th Cir. 1929).

Other courts have placed the repair point at a yard devoted exclusively for repairs (*Kaminski vs. Chicago, etc., R. R. Co.*, *supra*) or at the point where it is taken out of service and placed on tracks used exclusively for repairs. (*New York C. & St. L. R. Co. vs. Kelly*, 70 F. 2d 548 (7th Cir. 1934). The *Kelly* case says that "mere shifting of cars within the place of repair" does not put the car in use. But in *Kelly* the car was not being moved at the time of the injury. In *Kaminski* the

injury occurred because of a defective grabiron while the cars were being switched in a yard devoted exclusively to repairs.

The defendant reads Rigsby as a case in which the cars had not yet reached the repair point. For this purpose he gives the repair point a restricted meaning. There the cars were on the spur track for the sole purpose of waiting to go to the shop. They had been withdrawn from service. For the purposes of this case the defendant reads repair point broadly. Here, he says, the car reached the repair point when it was placed out of service and minor electrical repairs were performed on a siding used both for repair and storage in a yard which is actively used in making up trains for interstate service. By his argument, the result in Rigsby would be different had some minor repairs unrelated to the defect which caused the injury been made on the spur track.

I do not believe that the result depends upon such a quibble entirely unrelated to the injury or to the repair of the defective part which caused it. Even if we carry this repair point analogy to the bitter end, the track where the electrical repairs were made might be the repair point with regard to those repairs but it certainly was not the repair point for the defective grabiron. The Charlottesville was at the time of injury being taken to the grabiron repair point. Although in Kaminski the cars were in a yard devoted entirely to repair, that case may be contrary. I am not bound by it. As I

view it, section 4 was designed to protect yard men in just such an operation as this. The car was in use in interstate commerce even though being switched to the heavy repair track. That it may not have been in use in moving interstate traffic or in use on the carrier's line is immaterial. The Act applies as a matter of law.

It is ordered that the motion for a new trial be and is hereby denied.

Dated: December 29th, 1954.

/s/ EDWARD P. MURPHY,
United States District Judge

[Endorsed]: Filed December 29, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Southern Pacific Company, a corporation, defendant in the above entitled action, deeming itself aggrieved by the judgment in the above entitled action, does hereby appeal to the United States Court of Appeals for the Ninth Circuit, from said judgment and from the whole thereof. The judgment from which said appeal is so taken is the judgment on the verdict of November 23, 1954, herein, and the judgment stamped filed on the 24th day of November, 1954,

in the office of the Clerk of the above entitled District Court.

Dated: January 24, 1955.

/s/ A. B. DUNNE,

/s/ DUNNE, DUNNE & PHELPS,

Attorneys for Defendant and Appellant, Southern Pacific Company, a Corporation.

[Endorsed]: Filed January 24, 1955.

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Whereas, Southern Pacific Company, a corporation, defendant in the above-entitled action, is about to, or intends to, appeal to the United States Court of Appeals for the Ninth Circuit from the judgment entered in the above-entitled action in the above-named United States District Court on the 24th day of November, 1954, in favor of John Blazin, plaintiff, and against Southern Pacific Company, a corporation, defendant, for the sum of Twenty Three Thousand and Fifty Dollars (\$23,050) and costs of suit, and from the whole of said judgment; and

Whereas, said appellant is desirous of staying execution of said judgment so to be appealed from;

Now, Therefore, Indemnity Insurance Company of North America, a corporation duly incorporated

under the laws of the State of Pennsylvania, for the purpose of making, guaranteeing, and becoming surety on bonds and undertakings and having complied with all of the requirements of the State of California respecting such corporations, does hereby, in consideration of the premises, undertake and promise, and does hereby acknowledge itself bound, in the sum of Thirty Thousand Dollars (\$30,000), being in excess of the whole amount of the judgment, costs on appeal, interest, and damages for delay, that if the said judgment appealed from, or any part thereof, be affirmed or modified or if the appeal be dismissed, the appellant will pay and satisfy in full the amount directed to be paid by the said judgment, or the part of such amount as to which the judgment shall be affirmed, if affirmed only in part, and all costs, interest and damages which may be awarded against the appellant upon said appeal, and that if appellant does not make such payment within thirty (30) days after the filing of the remittitur from the United States Court of Appeals for the Ninth Circuit, or from such other court as may and shall lawfully issue the remittitur in the Court from which the appeal is taken, viz., in the United States District Court for the Northern District of California, Southern Division, judgment may be entered in said action on motion of Respondent, John Blazin, and without notice to said Indemnity Insurance Company of North America, a corporation, in his favor against the undersigned surety for such amount, together with interest that may be due thereon and the dam-

ages and costs which may be awarded against said appellant upon such appeal.

In Witness Whereof, the said Indemnity Insurance Company of North America, a corporation, has caused this obligation to be signed by its duly authorized attorney-in-fact and its corporate seal to be thereunto affixed at San Francisco, California, this 21st day of January, 1955.

[Seal] INDEMNITY INSURANCE COM-
 PANY OF NORTH AMERICA,

/s/ By GEORGE F. HAGG,
 Its Attorney-in-Fact

Approved:

/s/ EDWARD P. MURPHY,
 United States District Judge

Notary Public's Certificate attached.

[Endorsed]: Filed January 24, 1955.

[Title of District Court and Cause.]

DESIGNATION OF RECORD

Southern Pacific Company, a corporation, defendant in the above entitled action, and appellant to the United States Court of Appeals for the Ninth Circuit from the judgment in said action, hereby designates for inclusion in the record on appeal all of the record and records, proceedings and evidence in the above entitled matter.

Without restricting the foregoing, there is hereby

designated for inclusion in the record on appeal all of the matters referred to in Rule 75(g) of the Rules of Civil Procedure and a complete Reporter's Transcript of all proceedings, including, but not restricted to, opening statements of counsel, evidence offered and received, instructions to the jury, defendant's objections and exceptions to the charge to the jury and all proceedings on motion for new trial including the order and opinion denying that motion, and all of the papers and proceedings to the end that there shall be included therein the complete record and all of the evidence and proceedings in the action.

Dated: January 28, 1955.

/s/ A. B. DUNNE,

/s/ DUNNE, DUNNE & PHELPS,

Attorneys for Defendant

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 28, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify the foregoing documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case, and that they

constitute the Record on Appeal herein, as designated by the Appellant:

Complaint.

Answer.

Deposition of John Blazin.

Verdict.

Judgment on Verdict.

Notice of Motion for New Trial.

Order Denying Motion for New Trial.

Reporter's Transcript of Proceedings, Nov. 22, 1954.

Reporter's Transcript of Proceedings, Nov. 23, 1954.

Reporter's Transcript of Conclusion of Proceedings, Nov. 23, 1954.

Notice of Appeal.

Supersedeas Bond.

Appellant's Designation of Record on Appeal.

Plaintiff's Exhibit 1.

Defendant's Exhibits A, B, C, D, E, F, G, H and I.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court this 2nd day of March, 1955.

[Seal]

C. W. CALBREATH,

Clerk

/s/ By C. M. TAYLOR,

Deputy Clerk

In the District Court of the United States, Northern District of California, Southern Division

No. 33178

JOHN BLAZIN,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY a corporation,
Defendant.

TRANSCRIPT OF PROCEEDINGS

Monday, November 22, 1954

Before: Hon. Edward P. Murphy, Judge.

Appearances: For the Plaintiff: Nichols, Richard, Allard & Williams, by Jesse Nichols. For the Defendant: Dunne, Dunne & Phelps, by M. H. Messner.

(A jury was duly empaneled and sworn.) [1*]

The Court: Mr. Nichols, did you have a motion which you wish to take up in the absence of the jury.

Mr. Nichols: Yes, Your Honor, I have a motion I want to take up out of the presence of the jury.

The Court: You may be excused for a few minutes, ladies and gentlemen. You may retire to the jury room.

(Jurors excused.)

Mr. Nichols: Your Honor, at this time I am going to move to strike the defense that has been

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

pleaded of contributory negligence. This action, as alleged in our complaint, the only cause of action alleged is the failure of the defendant company to maintain a grabiron and that the grabiron was missing, which was clearly an action under the Federal Safety Appliance Act, and under the section and under the cases an employee cannot be charged with contributory negligence in the event of an accident in his behalf brought under that section.

Mr. Messner: We have no objection to that, Your Honor, with the understanding that this is not an action under the Federal Employers' Liability Act, but is limited to the Safety Appliance Act.

Mr. Nichols: That is right, Your Honor, the cause of action as pleaded. [3]

The Court: That may be dismissed.

Mr. Nichols: Thank you.

The Court: Well, suppose we—I don't like to send the jury out and bring them right back, so we will take five minutes.

(Short recess.)

The Court: You may proceed.

(The following proceedings were had in the presence of the jury.)

Opening Statement on Behalf of the Plaintiff

Mr. Nichols: Ladies and gentlemen: I will make a brief statement to you of what the evidence will disclose in this case. As was indicated by His Honor

in the statement he made, Mr. Blazin was an employee and had been for some time for the Southern Pacific Company in a switching crew. There is a distinction between a man who works in interstate commerce and those that don't. The evidence will disclose—I think it will be admitted—that he was engaged in transportation work that involved cars that went all over the United States, and under that set of circumstances there is no Workmen's Compensation Act, as we know it here in California. The act is one that—the act which permits this action is a federal act and it's principally the Safety Appliance Act which provides in railroad equipment the railroad has a very definite standard that they must meet. [4] The evidence will disclose it is required that all vestibule cars have what we call grabirons.

The happening of this accident is one that is easy to relate. It occurred in September of 1952. I have placed on the board over here—it is rather roughly drawn and doesn't indicate the exact manner in which these tracks operate; if there is any criticism of the tracks themselves it will be laid to me in the manner in which I have placed it on the board—but over in Oakland at the Southern Pacific yards they have an old mainline track, and then they have another track that feeds off into a number of—not feeder tracks, but tracks where they permit the cars to remain when not in use. Storage tracks, I think they are called.

The evidence will disclose in this case that the crew that Mr. Blazin was working on were dis-

tributing cars throughout that yard, and on the day that the accident happened, they had taken a car, I believe this will be the evidence, out of what they call the 34 lead, and they brought the car out on this line and were going to send it down into the 28 lead. I may be inaccurate by numbers—we have the gentleman here; it can be accurately disclosed to you.

Mr. Blazin's task that day would be to cut the car, I think it was a passenger car, when they pulled the car out of the 34 lead and got out on that track the engineer would reverse his motion and send the locomotive forward with this car in [5] front of it and at a certain speed, why, the car would be cut loose and would go down into this 28 track.

We expect to show this: that under the rules of the company in the event there is a defect in a car it should immediately be posted and a sign placed on——

Mr. Messner: Just a moment. If the Court please, in view of the stipulation this is not a case that is proceeding on the theory of negligence. I don't think that is important.

The Court: I think you are right, counsel.

Mr. Nichols: We will expect to show that there was no indication other than it was a normal car, that the normal car requires on each stairway two grabirons, and it is a matter of great importance to these men, because in swinging on and off they have to be watching the signal man and can't be looking to see if everything is in place.

The evidence will disclose as Mr. Blazin got onto the car, just as he got onto the car it started, and he swung on with his left hand, and he was swinging over to get the right grabiron. In the event he had firmly affixed himself to the right grabiron he then had his left hand free, he would have reached down and done the cutting off that was necessary. But it just happened there was no right grabiron, and as the law requires one to be, and as a result he lost his balance and was swung around and hit by the side of the car.

It was one of those injuries that at the moment did not [6] appear to be too severe to him, although he was in a very short space of time. He reported it to the company and made a report of the accident, and made a report of the absence of this iron, this grabiron, and obtained some very temporary medical care that day.

He worked for a period of two days, and by that time his back, in the lower back his injuries had become so severe that he was off, I think, approximately two months and he had a period of time he was working in a great deal of pain in his back, that bothered him when stooping, and some period of time following that endeavoring to do his job one of the things he should have been able to do, the back flared up and he was off again.

He had a hernia that developed as a result of this accident.

We expect to show that he has had a salary loss somewhat in the neighborhood of \$2500, maybe more than that. He was making about \$430 a month with-

out taking out his deductions. He had been a man regularly employed, had a good record with the company.

Since that time he has had a great deal of difficulty with his back and he is still having difficulty. We have the hospital records; he has gone to the hospital on numerous occasions, and we will make that information available to you.

The Court: Do you desire to make your statement now? [7]

Mr. Messner: The defendant would like to reserve its statement.

The Court: You may do so.

Call your first witness.

Mr. Nichols: For the purpose of the record, we subpoenaed the hospital librarian, and she brought these records. As I understand it from counsel, they can be admitted, and subject to any—if there is some material that may not be material, we can point it out to the Court and secure the Court's ruling. I ask that the records be admitted and marked appropriately.

Mr. Messner: Satisfactory, Your Honor.

The Court: Very well, admitted.

Mr. Messner: At this time I would like to have an order excluding witnesses.

(Whereupon the hospital records referred to above were received in evidence and marked Plaintiff's Exhibit No. 1.)

The Court: All witnesses in the trial of this case will remain outside in the office of the Bailiff until such time as they are called by him.

JOHN BLAZIN

called as a witness on behalf of the plaintiff, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows: [8]

The Clerk: Please state your name and occupation for the record.

The Witness: John Blazin. I am a yardman for the Southern Pacific Company.

Direct Examination

Mr. Nichols: Q. Mr. Blazin, how old are you?

A. 29 years old.

Q. Are you married? A. Yes.

Q. Family?

Mr. Messner: Just a moment. Your Honor, I will object to marital status; isn't important.

The Court: I think the background of the witness is always material. I don't see that it would cause any harm to establish marital status. Overruled.

Mr. Nichols: Q. When did you first become employed by the Southern Pacific Company?

A. In 1942.

Q. And at that time what type of work were you doing for them?

A. I was a laborer and an engine watchman.

Q. Keep your voice up.

A. I was a laborer and an engine watchman.

Q. Were you at that time going to school?

A. Yes.

Q. And following—how long a period were you

(Testimony of John Blazin.)

continuously [9] employed by the company at that time? A. Approximately eight months.

Q. All right. Then after getting out—incidentally, how far did you go in school?

A. I graduated from high school.

Q. You graduated from high school?

A. That's right.

Q. Following your graduation from high school, when was it that you went back to work for the railroad company? A. In May of 1946.

Q. And in what capacity were you employed by the company then?

A. As a yardman—as a clerk, excuse me.

Q. And a clerk employed where?

A. In West Oakland yards.

Q. And was it work that kept you in the yards or work that kept you in the office?

A. Partially in the yards and partially in the office.

Q. And how long did you do clerical work?

A. Approximately three weeks.

Q. And then just tell the ladies and gentlemen what you did.

A. Then I transferred to the switching, I made a recommendation if I could change and I was accepted, and I changed as a yardman.

Q. Mr. Blazin, it is difficult to hear you. Keep your voice [10] loud so we can all hear you.

And from 1946 on were you employed by any other company other than the Southern Pacific Company? A. No, I wasn't.

(Testimony of John Blazin.)

Q. And was your employment continuous during that time? A. Yes, sir.

Q. Except for illness, your throat, and that sort of thing, had you had any serious ailment as far as you knew prior to the time this accident occurred? A. No.

Q. You had some time off on occasions over that period of six years where you had a throat difficulty, did you?

A. That's right. I had an appendicitis operation and had a virus.

Q. How long, about, would you say had been the longest you had been required to be away from work because of illness during 1946 up to 1952?

A. Approximately about a month.

Q. Now in 1952, the day that we are going to discuss your activities—your activities on that day, rather, September 15th, will you tell us what crew you were assigned to?

A. I was assigned to a yard crew in the West Oakland passenger yard. The foreman on the job was Don Gay, and the other helper was Mr. Moulton, with an engineer and fireman.

Q. Now, what were your duties—first of all, what was the [11] crew doing?

A. Our duties was to make up passenger trains and to break up the trains as they came in.

Q. And that took cars that went all over the United States? A. That's right.

Q. When this accident occurred, what were you doing?

(Testimony of John Blazin.)

A. I was in the position of cutting off a car that we was going to throw out of the storage track.

Q. That means something to railroad men, but actually, so that the ladies and gentlemen will know, were you making up a train or were you breaking up a train?

A. We were just throwing a car out of the storage track.

Q. Now, there are over in Oakland a number of tracks called storage tracks?

A. Yes, sir.

Q. And when a Pullman car is not in use is that where it is placed? A. That's right.

Q. And from what track were you taking this particular car?

A. We were taking it out of 34 track and we were going to throw it up the 28 lead.

Q. I have placed on the board, and I know it is very crudely done—is there an old mainline track that would be somewhere in the neighborhood as indicated here (indicating on the blackboard)? [12]

A. Yes, sir.

Q. Then is there a track that goes off of that that leads into these various leads?

A. That is right.

Q. And leads into these storage tracks?

A. Yes, sir.

Q. And disregarding the angle, would 28 track be in about the same relative position that I have, say, to 34 here? A. Yes, sir.

(Testimony of John Blazin.)

Q. And which way do those tracks extend, do you know? Is that north or south or——

A. I imagine it would be north and south.

Q. You mean north would be the top?

A. No, that would be the south.

Q. North would be down here (indicating)?

A. That's right.

Q. West would be in this direction, then, wouldn't it (indicating)?

A. Yes, sir.

Q. So that was there more than one passenger car attached to the locomotive?

A. I believe there were eight passenger cars attached.

Q. And where was the—you remember the name of this car that the accident happened on?

A. The Charlotteville. [13]

Q. Charlotteville. And where was the Charlotteville in that group of eight?

A. It would be on the opposite end of the engine. In other words, it would be on the western—in the track it would be on the southern end of the track.

Q. I see. So that the operation then called for the locomotive to push the number of cars down into 34 where you hooked on to the Charlotteville and brought it out over to this track, is that right?

A. Usually the cars were stored in the track and we went in with the engine and hooked on to these cars.

Q. All eight cars were on the 34 track?

A. That's right.

Q. And what is the track called, so that we can

(Testimony of John Blazin.)

use the proper name, the track that extends along this fashion (indicating)?

A. That is just the lead.

Q. The lead track? A. Just the lead.

Q. Now, when the car, when the locomotive went down into 34 track, what position were you in?

A. I was following the engine; I tied the engine on to these cars.

Q. And did the engine go down with the—did it go down into that lead 34 track, rear end being the lead, or the front [14] end the leading part?

A. The front end was the lead part.

Q. So that the engineer was on what side then?

A. It would be on the north side, or the right side going into the track.

Q. And after you made the attachment the engine pulled on out and pulled out in this direction, is that right (indicating)?

A. That's right.

Q. Now, what position did you take?

A. I was standing on the lead as the cars were being pulled out.

Q. And was the Charlottesville the only car that was going to be let go of down into 28 track?

A. Yes, sir.

Q. When did you first learn that?

A. As the cars pulled out on the lead and I was watching the foreman. He gave me a sign to let one car go.

Q. Could you tell us about where you were standing, Mr. Blazin?

(Testimony of John Blazin.)

A. I was standing about where the curve is there, where the two tracks separate (counsel indicating on the blackboard.)

That would be farther to your left there.

Q. Up here (indicating)?

A. That's right.

Mr. Messner: Mark that? [15]

Mr. Nichols: I can mark that.

Q. Will you tell me when (indicating)?

A. Right about there.

Q. Call it B-1. Now, is that the position, the approximate position that in the type of work you were doing you should have been located?

A. That's the position I should have been in.

Q. And what type of signal, if any, did you get as to what you were going to do?

A. When the cars stopped, the foreman—I was watching the foreman—he gave me a signal to let one car go, which would be just a clap of the hands, to let one car go.

Q. Where was the foreman?

A. He was approximately by 32 switch, in between 32 and 34 switch.

Q. Down in this area (indicating)?

A. That's right.

Q. That is B-2; that is where the foreman was located.

Now, Mr. Blazin, would you tell the ladies and gentlemen the approximate distance that would be in feet actually on the ground?

A. Approximately 100 to 120 feet.

(Testimony of John Blazin.)

Q. This accident occurred during daylight?

A. Yes, sir.

Q. At about what time? [16]

A. At about eleven o'clock in the morning.

Q. And when—incidentally, who was the foreman?

A. Don C. Gay.

Q. Gaile?

A. Gay, G-a-y.

Q. Now, when he gave the signal had the cars come to a stop?

A. They had.

Q. And would the position that you had occupied be one that you would be—supposed to wait until you got a signal as to what you were to do?

A. That's right.

Q. How was the signal given?

A. As I was walking towards him he just clapped his hands. That is the signal for one car.

Q. What did that indicate to you, then?

A. To get aboard this car and cut it off when he gave the proper signal.

Q. Now, which end of the car would you get off on, get—alight, board, rather?

A. Where the two cars would be connected together. In other words, it would be on the east end of the car.

Q. Almost the length of the car between you and the other end of it?

A. That's right.

Q. And what opening does the car have? [17]

A. They have a vestibule with steps.

Q. And are you familiar with the requirement as to grabirons?

A. Yes, sir.

Q. And what is the requirement?

(Testimony of John Blazin.)

A. There is to be a grabiron at the left and the right portion of the steps in order to help you board the car.

Q. Now, what coloring was the car?

A. I believe it was a dark green.

Q. As distinguished from the streamlined cars?

A. That's right. It would be a dark green.

Q. Were the stairways open? Were the stairs down and open?

A. Yes, sir.

Q. When you received a signal what did you do?

A. I got on the car—I started to board the car and I grabbed hold of the left handhold and swung my feet. As I was swinging on the car, the cars began to move and I reached for the right hand handhold, and it was missing, and I hit the ground with my feet, hanging on with my left hand and started swinging between the two cars and just as I was swinging in between, before my hand outstretched, I was hit on the back by the second Pullman and knocked out and away from the cars on the ground.

Q. Is the location of where the grabirons are to be fixed—in other words, do you always find them in the same spot?

A. They are in the same spot on those particular cars.

Q. And what is the coloring? [18]

A. The grabirons and the cars blend in together. I believe they are the same color.

Q. In doing the operation that you were doing,

(Testimony of John Blazin.)

would it have been necessary for you to grab both grabirons at the same time? A. Yes, sir.

Q. And had there been two grabirons there, what would have been the thing that you would have done?

A. I would have reached with my right hand for the right grabiron and released my hand with the left hand in order to grab the cutting lever to leave the car go.

Q. Well, there again, where is the cutting lever?

A. It is below alongside of the steps. It is below the left grabiron in between the cars.

Q. Did you reach around the side of the car to do that?

A. That is right, you reach around the side in order to pull the cutting lever.

Q. Was the train actually in motion when you made your grab for the right iron?

A. It had just started its motion.

Q. Any knowledge at all of the absence of the grabiron? A. No, sir.

Q. When you were struck by the second car, what portion of your body was struck?

A. I was struck down the center of the back, all the way up to my head with the corner of the car. [19]

Q. Did you experience any pain then?

A. I was shocked, I didn't know exactly what had happened. I didn't realize, even after I was down on the ground, I couldn't realize what happened.

(Testimony of John Blazin.)

Q. And ultimately did you continue on that day with some of your work?

A. Well, after I got up I moved around a little bit and I continued with the work for about an hour, and then my back began to stiffen and pain, so I saw the doctor.

Q. And where was the doctor?

A. In the Southern Pacific Emergency Hospital in West Oakland.

Q. Who is that doctor?

A. Dr. Stromberg.

Q. And what if anything did he do for you?

A. Well, he talked to me and he says it would bother me more in three or four days, and he gave me an analgesic balm to apply.

Mr. Messner: That is objected to——

The Court: Don't tell us what the doctor told you. He may answer.

A. (Continuing) Some analgesic balm.

Mr. Nichols: Q. Did you finish out the day?

A. Yes, sir.

Q. On the following day what happened?

A. I returned to work and I worked the whole shift, although [20] I had pain in my back and I returned to the hospital and was given more of the analgesic balm.

Q. And where was that applied?

A. To my back.

Q. Did you get relief from it?

A. For a while. There was an awful lot of heat,

(Testimony of John Blazin.)

bit.

Q. Were you free from pain on the day after the accident? A. No, sir.

Q. Just tell His Honor and the ladies and gentlemen the next day what happened.

A. I worked, I believe, for two days, possibly three, following the accident, and I saw that I wasn't getting any relief, so I went to see another doctor for treatment.

Q. Who was that doctor?

A. That was Dr. Gates.

Q. Is he a Southern Pacific doctor—was he then?

A. Yes, he was a Southern Pacific doctor.

Q. What did he do for you?

A. He gave me diathermy treatments for about two months off and on.

Q. Did you go to the hospital at all during that time?

A. Not until about a month after the accident, why, Dr. Gates sent me to the hospital for X-rays.

Q. That was the Southern Pacific? [21]

A. That's right.

Q. Were you just in and out the same day?

A. Yes, sir.

Q. Now, what did Dr. Gates do for you during that time?

A. Well, he gave me the diathermy treatments. That was about the only treatments, I believe; he gave me some pills.

(Testimony of John Blazin.)

Q. Were you taking any treatment?

A. I was taking hot baths; I had a heat lamp that I used, and I used the analgesic balm and with rubdowns, my wife gave me rubdowns.

Q. Then how long was it before you returned to work?

A. I believe I returned to work about the 17th or 18th of November 1952.

Q. Now, what was your salary? What were you regularly receiving for your services?

A. Approximately \$430 a month.

Q. And they made some deductions for railroad retirement, did they?

A. Yes, sir.

Q. And for income tax?

A. Income tax and for the Southern Pacific Hospital.

Q. And you think that your gross was how much?

A. About \$430 a month.

Q. And your take-home pay was about how much?

A. Probably about \$350, something like that.

Q. You were away from work then from September 18 to about November—

A. 18, 1952.

Q. When you returned to work were you free from pain then?

A. No, sir, I still had the pain.

Q. Were you wearing any appliance of any kind?

A. No, I was not.

Q. Were you taking any diathermy at that time?

(Testimony of John Blazin.)

A. After I returned to work I was taking my treatments at home, I had my heat lamps and hot baths, and hot baths along with the different types of treatment that I had.

Q. Now, just tell us what you did and how you worked and what happened.

A. I worked on and off from November 1952 until September of 1953, and then September of 1953, while throwing the switch my back tightened up on me again.

Q. Now, during that time were you ever free from pain? A. No, sir.

Q. Were you able to do the work the way you had prior to the accident of September 15?

A. I tried to do the work the best I could. I don't know if I did it as could; I don't believe I did it as good as I did before, but I tried to do the best I could.

Q. Well, were you limited at all in what you could do?

A. I had to be awfully careful that I didn't do any lifting [23] or jerk my body or twist my body in any way.

Q. What would happen when that would occur?

A. Then I would get terrific pain in my back.

Q. Was your back during that time, was there ever a time when you were completely free from pain in the back?

A. There were times when I had less pain; there were times when the pain was more severe.

Q. Now, during those periods from, say, Novem-

(Testimony of John Blazin.)

ber 1952 up until September 1953, were you seeing any doctor? A. No, sir.

Q. Now, you say you had something that happened in 1953 where your back tightened up?

A. That's right, in the process of throwing a switch my back tightened up.

Q. Throwing a switch—would that be part of the work you should be able to do?

A. Yes, sir.

Q. Nothing wrong with the switch, was there?

A. Not that I know of.

Q. In other words, it was a normal part of your job? A. That's right.

Q. And what happened?

A. It was near quitting time and we were allowed to tie up early. I went in and saw a doctor in San Leandro.

Q. What doctor was that? [24]

A. I believe his name is Stepman. He is an S. P. doctor.

Q. Did you give him a history of the original accident? A. Yes, sir.

Q. What if anything did he do for you?

A. He gave me some pills for muscle spasm, and pain pills, I believe they were.

Q. And did you lay off, then?

A. The following day I went back to him and he gave me a slip to go to the Southern Pacific Hospital.

Q. Did he make an examination of you?

A. No, no examination.

(Testimony of John Blazin.)

Q. What if anything did they do at the Southern Pacific Hospital?

A. They took X-rays, gave me different types of treatment, diathermy, different pills and drugs, together along with it—you mean all the treatment?

Q. Yes.

A. I have had novocain in my back and shoulders, and I have had X-ray radiation treatments, and they lasted about two weeks, and some kind of a spray that they spray on your back that is supposed to relieve muscle tension, and I have had heat and massage along with the diathermy.

Q. At some time did you have some difficulty with respect to a hernia?

A. Yes, sir. [25]

Q. Just tell us about that.

A. I believe it was in May of 1953 that I got off of a car, and in getting off this particular car I felt sort of—well, it wasn't a pain, it was tingling, more or less, in my groin. I didn't know what it was, I never made a report—I didn't know just what it was.

Q. Did they ultimately operate on that?

A. They operated on that in December of 1953.

Q. And was that part of the time that you were out from September?

A. Yes, sir, I was still off.

Q. Now, from 1953, September 22, other than on September 8, October 7—withdraw that.

Can you tell us the days, the period of time you lost from September 22, 1953 up to and including February 1 of 1954?

(Testimony of John Blazin.)

A. I believe I worked on the 7th and 8th of October and the 13th and 14th of November, I believe it was.

Q. In other words, you worked four days?

A. That's right.

Q. During that four months?

A. Yes, sir.

Q. And why weren't you able to work?

A. I was taking these treatments from the hospital, and my back was bothering me, and I didn't have a release from the hospital to go to work.

Q. Pardon me?

A. I didn't have a release from the hospital to go to work.

Q. When you go into the hospital for care and treatment of that kind, do you have to have a release before you can go back to work?

A. You have to have a release and o.k. by your supervisor.

Q. And you went back to work then February 1, 1954?

A. Yes, sir.

Q. And have you worked continuously since, or have you had any time off?

A. I have worked—I haven't had any great deal of time off, but I have been off and on since February of this year.

Q. And why was that? Why were you off?

A. A different times when I have the pain and headaches that I would get, I would have to be off for two or three days in order to rest up in order to go back to work.

(Testimony of John Blazin.)

Q. At the present time you are still working, are you? A. Yes, sir.

Q. Now, just tell us, Mr. Blazin, in your own words, whether you have any complaints at the present time with respect to your back?

A. I have pain in my lower back, in my shoulders, and in the back portion of my neck.

Q. Is that improving?

A. I don't know if it is improving. I still have the pain. [27] I don't believe that—

Q. Does it increase with work or does it decrease with work? Just tell us about it.

A. Well, as I start the day's work, the longer I work, why, the more pain I do have, and after eight hours, why, I am just about down.

Q. Is the condition improving over what it was, say, in March of this year?

A. Well, I believe it is improving, although I still have an awful lot of pain to contend with.

Q. Are you able to run and do things you did before? A. No, I can't run.

Q. Now, in your home, how large an area do you have where you live?

A. Approximately a half acre.

Q. Prior to the accident who cared for that?

A. I did.

Q. And how was it cared for? For what use would be the half acre land?

A. Oh, I had gardening and fruit trees and different things.

Q. Have you been able to maintain that?

(Testimony of John Blazin.)

A. No, sir.

Q. Are your outside activities limited at all by reason of your back?

A. I don't go to different things that I used. I used to go [28] to dances and I used to play ball and different things like that, which I haven't been able to now.

Q. Have you had some medical expense although you belong to the hospital plan?

A. Yes, sir.

Q. And most of the medical care has been supplied to you by that plan?

A. That is right.

Q. Have you had any other expenses?

A. Yes, sir, I had my own doctor that I had expenses.

Q. How much was that?

A. I don't know how much his expenses are up to the present.

Q. And who is that? A. Dr. Fisher.

Q. Any other expense?

A. I have bought heat lamps and heating pads and different drugs, ointments and liniments, and I have this brace that I had to buy.

Q. How much was the brace?

A. \$15, I think.

Q. And how much was your medicines and heat lamp?

A. I think the heat lamp was about \$8 and the heating pad, I believe, about five or six; I am not sure.

(Testimony of John Blazin.)

Q. Those were all minor amounts, then?

A. That's right. [29]

Mr. Nichols: I think that is all.

Mr. Messner: Start cross examination?

The Court: You may proceed.

Cross Examination

Mr. Messner: Q. Mr. Blazin, you mentioned some expense in connection with medical care and treatment by your own doctor, is that correct, sir?

A. That's right, sir.

Q. And who did you say that doctor was, sir?

A. Dr. Fisher.

Q. Dr. Fisher. When did you first report to Dr. Fisher?

A. I believe in October of 1953.

Q. In October of 1953. And what care and treatment did Dr. Fisher give you?

A. I was requested to have a physical examination by the Southern Pacific Company, and he performed the physical examination.

Q. The Southern Pacific Company sent you to Dr. Fisher to have a physical examination?

A. They asked that I get in contact with an outside doctor and have a physical examination so that they might base a settlement with them.

Q. Now, who in the Southern Pacific Company asked you to go to Dr. Fisher? [30]

A. Mr. Gustafson made a request that I see a doctor.

Q. Isn't it a fact that you went to Mr. Nichols' office and he sent you to Dr. Fisher?

(Testimony of John Blazin.)

A. No, sir, I called Mr. Nichols.

Q. You called Mr. Nichols?

A. I called him and requested if he knew any doctors I might see.

Q. I see. And he suggested to go to Dr. Fisher. Did Dr. Fisher ever at any time give you any treatment?

A. Yes, he has given me treatment.

Q. What treatment is that?

A. He has given me different kinds of exercises, and he has prescribed the brace that I am now wearing.

Q. When did Mr. Fisher first give you any treatment in connection with this injury?

A. Approximately six weeks ago.

Q. About six weeks ago. He first saw you in October 1953?

A. That's right.

Q. Had you seen Dr. Fisher between October 1953 and six weeks ago when he first gave you treatment?

A. I saw him once or twice before that; I don't recall the dates of that.

Q. You don't remember when that was?

A. It was in this year.

Q. It was this year? [31]

A. That's right.

Q. Did you go to his office on those occasions or did you see him somewhere else?

A. In his office.

Q. In his office. And did he examine you on

(Testimony of John Blazin.)

those occasions? What happened when you went to his office? A. He examined me.

Q. Examined you? A. That's right.

Q. Did he take X-rays of you?

A. Yes, sir.

Q. When did he first take the X-rays, was that in October of 1953? A. I believe so, yes.

Q. Did he take any X-rays after October 1953?

A. He took X-rays about a week or so ago.

Q. About a week or so ago?

A. That's right.

Q. Now, six weeks ago when you went to Dr. Fisher did you go there for the purpose of an additional examination at that time?

A. And for possible treatment.

Q. And for treatment? A. That's right.

Q. Now, have you been to any doctor other than Dr. Fisher except those doctors at the Southern Pacific General Hospital? [32]

A. No, not outside of the Southern Pacific doctors.

Q. I see. Now, you returned to work, I believe you said, on November 17, 1952, and you said that you worked on and off until September of 1953. That is a period roughly of ten months. Did you go to Dr. Fisher during that time?

A. No, sir.

Q. Did you go to the Southern Pacific General Hospital during that time?

A. I don't recall if I did. I may have gone once or twice, I may not have. I don't recall.

(Testimony of John Blazin.)

Q. You were treated by Dr. Gates during that period of time?

A. No. I believe maybe one treatment, although I am not sure.

Q. When would that have been?

A. I don't really recall.

Q. You don't know whether you went to him or not, is that true?

A. It might be true. I think I did go once, if I am not mistaken.

Q. Well, do you know whether it would have been during 1952 or would it have been during 1953?

A. 1953.

Q. It would have been in 1953?

A. Yes, sir.

Q. Now, you said that you worked on and off. Now, would you [33] be good enough to explain to the ladies and gentlemen what you mean by on and off, Mr. Blazin?

A. Well, I did work as regular as I could. Every once in a while I did have a few days, possibly two or three days that I took off and rested off in order to continue my duties.

Q. Mr. Blazin, starting in with November 1952 how many days did you have off on this on and off basis for the balance of November 1952?

A. I don't recall, sir.

Q. How many days in December 1952 were you off on account of this injury?

A. Well, I don't have my time books; possibly two or three days.

(Testimony of John Blazin.)

Q. How many days in January 1953?

Mr. Nichols: Counsel, don't you have that record?

Mr. Messner: Mr. Nichols——

Mr. Nichols: We will take your record for it, whatever it shows.

Mr. Messner: This man has a time book. It seems to me he knew this was coming for a long time. I shall get the time record.

Mr. Nichols: I make no question about it. We don't challenge the correctness of the Southern Pacific record as far as his time.

Mr. Messner: All right, then, I shall get the record. [34]

Q. Now, from November 17, 1952 until September of 1953, did you ever lay off work for any reason other than your physical condition brought about by the accident of September 15, 1952?

A. Oh, I believe I did for personal reasons.

Q. You did lay off for personal reasons. And how many times did you lay off for personal reasons, Mr. Blazin? A. That I don't know.

Q. Do you know in the total amount how much time you took off for personal reasons?

A. No, I don't.

Mr. Nichols: Can you approximate it for him, Mr. Blazin?

The Witness: Oh, maybe ten, fifteen days.

Mr. Messner: Q. That would be the total in the ten months, then, roughly, ten or fifteen days?

A. That is approximate.

Q. Thank you.

Mr. Messner: Take the noon recess now?

The Court: Take the recess now until two o'clock this afternoon, ladies and gentlemen. In the meanwhile, you are admonished not to discuss the case among yourselves or with anyone else, nor to form or express any opinion about the matter until it is finally submitted to you. Two o'clock this afternoon.

(Whereupon an adjournment was taken until

2:00 p.m. this date.) [35]

The Court: Proceed.

Mr. Nichols: If there is no objection on the part of the Court, counsel has agreed I can put the doctor, who is here, on the stand now and resume the examination of the plaintiff later.

The Court: All right.

Mr. Nichols: Doctor, will you take the stand?

LLOYD DELBERT FISHER

called as a witness on behalf of the plaintiff, having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

The Clerk: Please state your name and occupation to the Court and to the jury.

The Witness: Lloyd Delbert Fisher.

Direct Examination

Mr. Nichols: Q. You are a physician and surgeon licensed to practice your profession under the laws of California, are you, Doctor?

A. Yes, sir.

Q. Will you just state to the ladies and gentlemen what training you have had, medical training?

(Testimony of Lloyd Delbert Fisher.)

A. I am a graduate of the University of California Medical [36] School interned at the San Francisco Hospital, and then took a year in general surgery in Baltimore and two years in orthopedic surgery at the University of Virginia Hospital in Charlottesville, and then a year as an instructor in orthopedic surgery at the University of Southern California Medical School in Los Angeles.

Q. And how long have you been licensed to practice your profession, Doctor?

A. Since 1938.

Q. And do you confine the practice of medicine to any particular field?

A. Yes, I limit my practice to orthopedic surgery.

Q. And that involves just what portion of medicine?

A. That's a specialty in the field of medicine which deals with the musculature, musculo-skeletal system, the bones and joints and muscles and tendons that move them.

Q. And you maintain your offices where?

A. In Oakland, California, 447 29 Street.

Q. Are you on the staff of any of the hospitals in the East Bay?

A. Yes, I am on the staff of the Merritt Hospital, the Providence Hospital, the East Oakland Hospital, Highland and Fairmont Hospitals, and in Berkeley the Herrick Memorial and Alta Bates Hospitals.

Q. Doctor, did you have an occasion to examine

(Testimony of Lloyd Delbert Fisher.)

Mr. John [37] Blazin, who is the plaintiff in this action? A. Yes, sir.

Q. And would you just tell us when and where it was that you first saw him?

A. I first saw him in my office on October 23, 1953.

Q. And at that time did you obtain a history from him with respect to an accident that he had?

A. Yes, I did.

Q. And just tell the ladies and gentlemen what the history was that you had obtained.

A. Well, Mr. Blazin said that well, he complained principally of pain in his neck, back, upper back and also in his low back, and said that he was injured on September 15, 1952 while employed as a yardman for the Southern Pacific Company. He reached for a grabiron on a moving passenger car which was—but it wasn't there. In other words, the iron was missing. This threw him off balance. He had a grip with his left arm on the grabiron and this swung him to the left, swinging him around so that he struck another passenger car going in the same direction. However, he hung on to the car until he felt he could let go safely.

When he did let go he more or less stumbled and was knocked to the ground. This occurred in the Oakland yard.

About an hour later he saw Dr. Stenberg, a company doctor, who examined him and gave him some analgesic balm to rub on his [38] back, told him it would probably hurt him for the next two or three

(Testimony of Lloyd Delbert Fisher.)

days. He finished working that day and worked for two days following. He saw the nurse on the two following days and was given a massage to his back.

The fourth day the pain became so severe he laid off work and went to see Dr. Stomberg and had a heat treatment in his office.

Following this he saw Dr. Gates, who was closer to his home. He went to Dr. Gates' office daily for heat treatments for two or three weeks.

About a month after the injury he had X-rays made at the Southern Pacific Hospital in San Francisco. He does not recall the name of the Doctor he saw there, but the X-rays he says were those——

Mr. Messner: Just a moment, not what he was told was the X-rays showed.

The Court: Objection sustained.

A. (Continuing) About two months after the accident he returned to work. Dr. Gates told him about this time that he had an arthritic condition.

Mr. Messner: Pardon me. Just a moment.

Mr. Nichols: Q. Doctor, you won't be permitted to tell what the doctor told him. Actually the X-rays taken were negative, is that not correct?

A. Yes, sir. [39]

Q. Meaning there were no fractures?

A. No fractures.

Q. In any part of the history if by chance it appears where he is relating something that somebody else told him, we will eliminate that portion of it, Doctor.

A. Yes.

Q. All right.

(Testimony of Lloyd Delbert Fisher.)

A. He said that the heat treatments helped him for two or three hours after each treatment, so he bought a heat lamp and heating pad for himself and used these at home about three times a week to his shoulders and back.

He did not see Dr. Gates for about six months. Shoulders and back were bothering him more than he thought they should, so he returned to Dr. Gates and was given a few more treatments. This did not seem to help except for a brief period of time, so he didn't return.

On the 22nd of September of 1953, I believe it was, he threw a switch at work, and as he threw it felt like something hit him in the back, like a sledge hammer, he describes it, and when he straightened up he got a pain in the back underneath his ribs.

He went and saw Dr.—went to see Dr. Stepman, the company doctor at San Leandro, who gave him some pain pills and some pills for muscle spasm. That evening he took a warm bath. That seemed to help, but got a fever and headache. The [40] following day he returned to the S. P. Hospital where further X-rays were made.

He returned to the S. P. Hospital for heat and massage to the back and shoulders daily for four days, and then received a release to return to work on light duty, but the company would not accept the light duty release, so he returned to the hospital, saw Dr. Schuster, who taped his back. Then he returned to work for two days, but began hurting

(Testimony of Lloyd Delbert Fisher.)

again so again returned to the S. P. Hospital, this time saw Dr. Rubin.

Dr. Rubin removed the tape from his back, advising him to work for about three weeks, telling him that——

Q. That is hearsay unless counsel wants it in.

A. Dr. Rubin gave him a release to return to work the following Tuesday, but since his back was still quite painful, did not return to work.

Was next seen by Dr. Strange at S. P. Hospital October 14. Dr. Strange—well, they wanted him to enter the hospital, but he didn't feel that this would benefit him, so did not go in.

He denied any trouble with the neck or back prior to the accident of September 1952, and when I saw him he hadn't worked since October the 7th of 1953, due to the pain in his back and shoulders principally.

Q. Now, did you make any finding as to what his present symptoms were?

A. Yes, I did. You mean examination? [41]

Q. Yes.

A. I did a general physical examination to see whether there was anything in his general health which might affect the parts of which he complained, or of his ability to recover from them.

Q. What complaints did he make to you at the time he saw you, Doctor?

A. Well, he complained of a soreness in the shoulders all the time, which came more severe if he moved around and if he did any lifting. He also

(Testimony of Lloyd Delbert Fisher.)

complained of pain in the lower back if he lifted, turned, bend over, or if he would sit in any one position for any period of time. Also pain in the back of the neck after he worked a while. Believed this was caused by the other pains and the muscles of the neck would tighten up.

Sometimes he would have ringing his ears. Lately, quite a few times after he had over-exerted, he would become nauseated. This seemed to come at the same time as the headache and neck pain. After he over-exerts or works hard he had the experience of starting to raise his head and everything became blurred. He believed that he was more nervous and irritable.

When he—after—since his injury and until he went off work he was taking it easy.

Q. Was there anything in his past history that was contributory to his complaints, or could you tell us that? [42]

A. No, the only thing that, positive, was the virus infection in 1950 for which he was confined to the Southern Pacific Hospital for nine days, but had complete recovery. Also had appendix removed, S. P. Hospital, 1948, complete recovery. Those were the only positive things.

Q. Now, did you make an examination of him?

A. Yes, I did, and I examined him both with relation to the specific complaints and also to the general physical examination of his eyes, ears, nose, throat and heart, chest, abdomen.

(Testimony of Lloyd Delbert Fisher.)

Q. Those things you found to be in what condition?

A. Well, they were all in normal limits. General health was otherwise good.

Q. Pardon me?

A. I say his general health was otherwise good.

Q. All right. Now, what physical examination did you give him—I mean, what orthopedic examination?

A. Well, in examining his neck I found there was marked left sub-occipital tenderness and also tenderness in the mid posterior cervical region.

Q. Doctor, that means something to a medical man, but to a lay person it doesn't usually indicate what you are talking about. Can you tell us in more language what that means?

A. Well, the sub-occipital region is the region just below the skull in the back, and in his case on the left side, and then the mid posterior cervical region would be in the mid line [43] of the back of the neck, approximately half way between the neck and shoulders.

There was also tenderness in the left scalenus, and in both trapezius muscles, more on the right than on the left.

Now, the scalenus are muscles which come down in the side of the neck and attach to the first and second ribs, and the trapezius muscle is the muscle that comes from the neck down on the shoulder—you can pick them up with your finger here (in-

(Testimony of Lloyd Delbert Fisher.)

dicating)—and that one was tender on both sides, more on the right.

I examined the motion of his neck. There was full motion in all directions, but all extremes of neck motion caused pain, especially in the upper and mid back.

There was tenderness in both trapezius muscles and both the parascapular regions. Parascapular region, that is the region between the shoulder blade and the spine in the back, and both of those were tender. There was full motion of both shoulders, but extreme motions gave pain in the mid back.

In examining his low back there was marked bilateral lumbar tenderness, that is in the back below the ribs between the ribs and the pelvis. On both sides he was markedly tender, more on the left than on the right. The tenderness on the left extended laterally, that is to the side, to the mid axillary line. In other words, came around from the back to a point about here (indicating). [44]

I examined the motion of his back. On bending forward the fingertips came to within four inches of the floor. Backward bending was complete. Side bending to the right and the left were normal, fingertips reaching the level of the lower pole of the kneecap. Rotation of the spine to the right and to the left was 90 degrees, which is within normal limits.

All extremes of motion of the back, especially rotation, that is, bending the body, shoulders

(Testimony of Lloyd Delbert Fisher.)

around, gave pain in the mid back. That was all the orthopedic examination.

Q. Following the physical examination did you have any X-rays taken?

A. Yes, sir, I did.

Q. And of what areas?

A. Had X-rays made of the neck, the cervical spine, the thoracic and lumbar spine. The thoracic is the upper spine between the neck and the bottom of the rib cage, and the lumbar spine being between the ribs and the pelvis.

Q. That would mean, then, in sections you took his entire spine?

A. Yes, that's correct.

Q. All right. And they were negative for fracture; that is correct, is it not?

A. Yes.

Q. Was there any significant finding that you made from the X-rays that would be helpful in arriving at a determination [45] of what happened to this man?

A. Well, there was a mild curve, lateral curve, what we call a scoliosis, in the upper back, the thoracic spine, with apex of the curve at the level of the seventh thoracic vertebra on the right. Whether that had been there previous I had no way of knowing. It might be the result of muscle spasm.

In the X-rays of the neck, the cervical spine, there was a list of the spine to the right. In other words, it leaned to the right.

There was also an assymetry of the position of the deltoid process in relation to the lateral

(Testimony of Lloyd Delbert Fisher.)

masses of the atlas being closer to the later mass on the right than to the lateral mass on the left.

Now, this was associated with a shifting of the entire first cervical vertebra to the left side in relation to the second cervical vertebra, some narrowing of the joint space on the left as compared to the right.

These findings in the presence of injury are an indication of muscle spasm.

Q. Now, when you saw him, Doctor, as he went through these tests, could you tell us whether or not he was cooperative with you?

A. Yes, he was very cooperative.

Q. And did you come to any conclusions as to what had happened to this man? [46]

A. Yes, I felt that he had an acute neck strain, a bilateral parascapular strain, that is, the upper back between the shoulder blades, and a low back strain, and these all associated with bruising of the back—contusion, that is.

Q. Well, you used the term strain. Doctor, in your opinion was there any actual changes that occurred within the neck or lower back or the areas involved?

A. Yes, a strain, of course, is what occurs when you pull a soft tissue like a ligament or a muscle. You pull it beyond its elasticity, its power to return to its normal length, and when you do that some of the fibers will actually tear. It isn't like tearing a ligament or muscle completely across, you call that complete rupture, but it is, like, you say you had

(Testimony of Lloyd Delbert Fisher.)

a hemp rope that had been overpulled and some of the little fibers of the hemp would break—I think some of you may have seen a rope like that—and which would, of course, not be obvious at a distance, but see it at close quarters.

That is what happens. These are like little fiber-like tissue and they have a blood supply, and if they are torn, there is bleeding, and of course Nature repairs those, as she organizes the clot, and eventually change into scar tissue, each little place that was broken; end up with a little bit of scar and the result is multiple scars in this tissue that is strained.

Q. Did you find him to be a large and well muscular man, with [47] good muscle?

A. Yes, he is a big man and he is very well developed physically.

Q. As compared, say, with a broken bone, does scar tissue form in the muscles or in the tissue as rapidly, say, as, oh, callous will form in a broken bone?

A. Well, it forms more rapidly than callous.

Q. Well now, you saw him, Doctor, it was a matter of—say he was injured in '52, in September '52, you saw him in October of '53, medically do you have any explanation why he should be making complaints at that time?

A. Well, there are several reasons. In the first place, I think that his strains were rather severe, I mean, severe enough that he had enough residual scarring in there to give him trouble. Of course, all

(Testimony of Lloyd Delbert Fisher.)

scarring doesn't give trouble, but when it does give trouble it is because it is in a position where it is constantly pulled on. You see, when a scar matures, as it gets older it contracts, and so that the part tends to be tight. That's why, in our treatment, we try to stretch them out and soften them up by massage and so forth, and if it remains tight in spite of treatment, then every time that is pulled on it stretches the adjoining tissue and makes it painful.

Another thing that happens, sometimes these little nerve endings, these little pain endings are tied up in the scar and [48] then each time the scar is pulled on it irritates that pain ending.

Q. Did you get a history from him on returning to work things that didn't require lifting or bending he could do pretty well?

A. Yes, with a light type of work that didn't require a lot of stooping, bending and squatting or climbing, he wasn't bothered too much.

Q. Assuming the complaints he tells you that he has, the aches, and assuming the history that he had, would that be a type of thing that would be a cause of pain, as, say, trying to throw a switch that requires some weight or some muscle?

A. Yes, the force of the exertion is important, and also the number of times, repetition.

Q. Now, did you make any recommendation to him so far as continuing treatment or anything of that kind?

A. Yes, I did. I thought that he should continue

(Testimony of Lloyd Delbert Fisher.)

treatment and also made some further suggestions that he hadn't up to that time received. He had the heat and massage, and of course ideally I think more rest, less fatigue, would have been beneficial, but he felt he had to work, of course, and also suggested injecting the points of maximum tenderness with some local anesthetic like novocain, the use of a back support also.

Q. Now did you see him subsequent to that, Doctor? A. Yes, I did. [49]

Q. Will you give the Court and ladies and gentlemen the next date?

A. Next saw him on August 10 of 1954, this year, and I saw him on the 28th—

Q. What if anything transpired on August 10, an examination made or—

A. Yes, I asked him what had transpired since I had seen him previously and also what his complaints were at the time.

Q. What history did you get in that regard?

A. He said that he had been hospitalized twice since October of 1953; once in November '53 and again in mid-December. In November for 10 days. He had novocain injections in his neck and he was also put in traction, that is, a pull in his neck while he was in bed, and received diathermy and massage with temporary relief.

In December he was hospitalized for three weeks and at that time had a hernia operation, following which there was a good recovery and he returned to work on February 1, 1954.

(Testimony of Lloyd Delbert Fisher.)

After working three or four days he had to return to the outpatient department because of pain in the neck and back, but continued working, received more diathermy and massage.

In June of 1954 he had six X-ray treatments, one every other day, with questionable relief. He felt that he still had as much pain as before.

Three weeks before I saw him—that would be the latter [50] part of September—he had received novocain injections in the neck and obtained relief from these for a period of about five days to a week.

He was not working but had considerable pain.

In November he worked only two days and did not return to work until February the 1st. He worked steadily since that time at his regular job except for a few days off.

Q. What symptoms were present when you saw him in August, Doctor, of this year?

A. He complained of pain in the shoulder which is aggravated by over use such as in bending and reaching and so forth. He also complained of pain in the neck. When this pain is present, which is almost constantly, headaches begin and occur weekly, sometimes lasting two or three days. The neck becomes tense and taut and when this occurs he becomes nervous and irritable.

He complained of pain in the mid back and this pain seemed to radiate upward into the head and shoulder. When you hold the outer tips of the

(Testimony of Lloyd Delbert Fisher.)

fingers, both hands back, numbness prevailed until rest or relaxed, and took medication.

Q. Now, did you again make a physical examination of him?

A. Yes, I examined him again and the neck, that was still marked by lateral sub-occipital tenderness below the skull. This time on both sides, full motion of the neck and in all directions, but pain on extreme motion. I checked sensation [51] in the back and neck with the point of a pin, and in the right lower posterior neck there was some diminished sensation here as compared to the other side. In the upper back there was marked tenderness in both trapezius muscles, muscles that run from the neck to the shoulder, and on full shoulder motion there was pain between the shoulders, pain on extreme shoulder motion.

In his super extremities, because of complaint of pain going down into his fingers, I examined the sensation with the point of a pin but found no change in the sensation in that test between the two arms. I also measured the circumference of the arm above and below the elbow to see if any atrophy, comparatively, and the right arm is larger than the left both above and below the elbow, which was consistent with the fact that he was right handed.

Q. That would be normal?

A. Yes. And I also tested his grip with a little device we call the dynamometer, a bulb with air pressure and registers on a gauge, and his—al-

(Testimony of Lloyd Delbert Fisher.)

though the grip seemed weak for a man of his size and occupation, the comparison between the two sides was about normal. The right was stronger than the left, tried each one three times alternately right and left, and the right range $119\frac{1}{2}$ and $101\frac{1}{2}$ pounds, whereas the left range ran 89 and 10 pounds. There was full motion of all the joints of his fingers, hands, wrists, elbows, and shoulders. His [52] low back, there was tenderness in the lumbo sacral region on which is the whole lower part of the back, the small of the back where the spine joins the pelvis and in the right sacroiliac region on that just to the right of the lumbo-sacral joint. I tested his back motion again, and on bending forward his fingertips reached to $41\frac{1}{2}$ inches to the floor which is—which is within normal limits. Backward bending was complete but this gave the most pain. Bending to the side was normal and rotation was normal.

Straight leg raising, which is a test made with the patient lying down and raising the leg straight up, he had 95 degrees in the right and 100 degrees in the left, but the right gave him pain in his low back. Leg lengths were equal. The circumference of the legs above and below the kneecap showed the right thigh to be slightly smaller than the left above the kneecap on the right. On the left, $20\frac{7}{8}$ inches, or five inches below the kneecap both the same, 15 inches.

Also tested sensation in legs which were normal, reflexes were normal.

(Testimony of Lloyd Delbert Fisher.)

Q. Now, Doctor, from your examination and from the history, in your opinion is there any connection in the complaints that he complained to you about here, on August 10th, that you would relate it to the accident that he had in September of '52?

A. Yes, I believe that they resulted from that accident and [53] also this re-injury of his upper back in November of '53, I believe it was.

Q. Is that injury to his upper back of '52 connected with the original injury, in your opinion?

A. Well, I think he was probably vulnerable because of his previous injury, and that in attempting to do what would otherwise be normal work, he got increased pain.

Q. During the noon hour did you have occasion to review some of the Southern Pacific Hospital records?

A. Yes, I did.

Q. And I noticed, Doctor, here, that on February 19 of 1954 the doctor there makes a notation there of marked muscle spasms of the musculature of the lumbar spine. Is that something that you would attribute to this accident?

A. Yes, very much so.

Q. Now, is that—excuse me, counsel—that date is February 19, 1954. Says: "Plaintiff returned with similar complaints, physical therapy offered, only temporary relief as due hot baths at home, marked muscle spasm in musculature of the right lumbar spine, back examination otherwise negative." And then makes suggestion of physical therapy. Have

(Testimony of Lloyd Delbert Fisher.)

you reviewed the records and found other notations where there was a finding here of, as late as 1954, muscle spasm?

A. Yes, there were three places in 1954, I believe, when muscle spasm was mentioned. Once in the—One was in the low [54] back, one would be between the shoulder blade, upper back; and the other in the neck.

Q. What does that mean to you, Doctor, a man with your training? What does the presence of muscle spasm mean?

A. Muscle spasm is the response of the body to pain. It is an attempt to arrest the part, limit the motion. It's an entirely involuntary thing, it is something that an individual has no control over himself, voluntarily. It's an increase in the contraction of the muscle. A normal muscle that is alive has a certain amount of contraction, normally what we call muscle tone. When the amount of that is increased, pull is increased through involuntary reflex. We call that a spasm.

Q. Is that something that, say, that Mr. Blazin could go out and make himself, a spasm in that area, voluntarily?

A. No. No, he can't do it. It is entirely involuntary, out of voluntary control.

Q. Is that something a medical man can see or feel?

A. Yes. The superficial muscles, you can feel it, if present to any degree. Of course, in deep muscles you can't put your fingers on those.

(Testimony of Lloyd Delbert Fisher.)

Q. Now, following your seeing him in August, did you see him subsequent to that?

A. Yes, I saw him in October 28 of this year.

Q. Was there any substantial change in his condition?

A. No, it was just about the same as before.

Q. And have you seen him any time since then?

A. Yes, I saw him on November 16 and November 18.

Q. And what is your actual opinion, Doctor, as to the man's condition—withdraw that.

The effect of this accident, what has it done to him, anything that will remain with him?

A. Yes, I think it has given him trouble, some of which at least will be permanent. It's been over two years since he was hurt now, and he still has a great deal of discomfort trying to work and he has had almost every type of treatment that we know for the condition except surgery, and of course you don't encourage surgery to the back. It requires a long period of convalescence in addition to being expensive, and if a man can do any other type of work we would rather not fuse his back.

Q. Doctor, in the times you have seen him has he ever indicated to you anything that would cause you to believe that there was any exaggeration of his complaints?

A. No, there hasn't been anything.

Q. Having in mind his history, and the present complaints that he has, and the hospital record that shows here, early as March, the existence of muscle

(Testimony of Lloyd Delbert Fisher.)

spasm, would that be of any help in permitting you to arrive at a conclusion as to how extensive the original injury was?

A. Yes, I think that he must have had a rather marked strain, [56] bruising, quite early at the time of the injury. And in spite of the treatment, possibly because he has tried to work all this time, it has ceased to improve beyond a certain point.

Q. Would you expect to get, or how much more improvement would you expect to get in the future, assuming he has good medical care?

A. Well, I think the thing to do, the type of work that he is doing, I think he is going to have quite a bit of pain. There are one or two things which haven't been tried which might improve him some, I think. But, to expect them to cure him would be expecting far too much. He might have some further improvement, probably.

Q. Would you anticipate that if he goes along with this type of work that he would suffer pain in the future?

A. I think, yes, he will always have pain.

Q. Will you tell us what your total charge has been to him for the services you have rendered?

Mr. Messner: Pardon me a moment. Insofar as charges the doctor may have had in connection with the examination, that may have gone for the information of the plaintiff or his attorneys. I don't think that they are proper.

Mr. Nichols: He never made any examination for me for information.

(Testimony of Lloyd Delbert Fisher.)

Mr. Messner: Well, Mr. Nichols, I think that the plaintiff testified he was not treated by this doctor until six [57] weeks ago and I have no objection to——

The Court: Q. What would you consider a reasonable charge for treatment, for the treatment you gave him, Doctor?

The Witness: Twenty seven fifty, I believe.

The Court: As far as the Court is concerned, if Mr. Blazin went to the doctor of his own volition wanting to get some assistance or some knowledge as to his condition, I think it is a perfectly proper charge and I will receive it in evidence.

Mr. Nichols: Q. What was the total charge made, Doctor?

A. I say, I didn't bring the card, but I can figure it here.

Q. Well, I wouldn't press it now. We can pass over that.

Do you anticipate, Doctor, that he will require any further immediate care?

A. Well, I think he will, symptomatic care, supervision, I mean, periodically, depending on what he is doing and how much pain he has at the time.

Mr. Nichols: That is all. Thank you.

The Court: Q. By the way, Doctor, when you made this examination of him, you didn't make it solely for the purpose of coming here to testify?

The Witness: No.

The Court: Q. You made that examination be-

(Testimony of Lloyd Delbert Fisher.)

cause you wanted to find out what was wrong with him, is that right?

The Witness: That is right. [58]

Cross Examination

Mr. Messner: Q. Doctor, do you have any file other than the report of October 29, 1953, and August 13, 1954? A. Yes, I have made——

Q. May I see that, please?

May I approach the witness, Your Honor?

The Court: You may.

Mr. Messner: Q. Now, Doctor, according to your report of October 29, 1953, and according to your testimony here today, at the time you examined Mr. Blazin you recommended that he wear a back brace, is that correct, sir? A. Yes.

Q. And that is when you first saw him in 1953?

A. Yes, sir.

Q. Now, when Mr. Blazin came back and was reexamined by you, and the next occasion was on August 10th of 1954, did he upon that occasion tell you that he had been wearing the brace that you suggested and recommended?

A. No, I don't believe he had.

Q. He didn't give you a history as to whether or not he had been wearing that brace?

A. No, I am pretty sure he didn't have a brace.

Q. You don't think he had been wearing the brace? A. No, he didn't have one.

Q. I see. All right. Now, do you know whether or not other [59] treatment that you recommended

(Testimony of Lloyd Delbert Fisher.)

in that report had been carried out in the meantime?

A. Yes, he had this radio injection. I don't know whether it was radio, at least novocain injections. He had that on a number of occasions at the Southern Pacific Hospital.

Q. I see. Now, Doctor, I note that in this first report that you made, you made a very detailed examination. And I note that among other things you have a notation appearing on page 3. I don't believe you have a copy of that.

(Witness is handed document.)

Q. Genital area, no hernia. Is that correct, Doctor?

A. Yes, that is the notation I have.

Q. You examined this man, and particularly directing your attention to that in October of 1953. And at that time you found no hernia, is that correct, Doctor?

A. Yes, that is right.

Q. Now, in the several examinations that you have made, Doctor, you have had X-rays taken, is that correct, sir?

A. Yes, on two occasions.

Q. And on each occasion those X-rays had been negative for any indication of fracture, is that right?

A. That is right.

Q. Now, you have made neurological examinations on this patient, have you not, Doctor?

A. Yes, sir. [60]

Q. Now, aside from, I believe you said, some hypotesia, on one side of the neck, on your examination on August 10, 1953 those neurological ex-

(Testimony of Lloyd Delbert Fisher.)

aminations have been negative, have they not, Doctor?

A. Yes.

Q. Neurological examination, so that the jury and I understand that, that is something where you go over and test the various nerve courses over a man's body, so that if there has been any interruption in nerve course, is that right, broadly speaking, in layman's language?

A. Yes. In other words, in the—yes, that is right, yes.

Q. I see. Now, you made measurements in connection with this man's various extremities, did you not, Doctor?

A. Yes.

Q. Now, when you made those measurements you found them to be within the normal limits?

A. All except the right thigh. On the last occasion the right thigh was smaller than the left.

Q. Right thigh smaller than the left thigh?

A. Yes, that is right.

Q. Now, you made various tests in connection with this man's ability to move the various parts of his body, did you not?

A. Yes, sir.

Q. On every occasion you found that those motions were within normal limits, were they not?

A. Well, the range was normal.

Q. Range of motion was within normal limits. Now, you made certain tests of reflexes, of the reflexes of this man, did you not, Doctor?

A. That is right.

Q. And you found those all to be normal, didn't you, Doctor?

A. That is right.

(Testimony of Lloyd Delbert Fisher.)

Q. Now, Doctor, all of these examinations we talk about are used by you medical men to arrive at conclusions as to whether or not people have things wrong with them or not, aren't they?

A. Yes, that is right.

Q. And they are quite important tests in making diagnoses as to what is wrong with the patient, isn't that true?

A. That is true.

Q. And that is quite an important test to determine whether or not there is anything wrong or not with the patient, isn't that true?

A. That is right.

Q. Now, Doctor, you have appeared on many occasions and testified in cases which the Southern Pacific Company was involved on the other side, have you not?

A. Number of cases, yes.

Q. As a matter of fact, I have seen you in court on many of those occasions, isn't that right, Doctor?

A. Well—— [62]

Q. We have seen one another?

A. Well, I don't remember many occasions, but——

Q. Well, Doctor, let me ask you just one more question. Do you ever recall a case that you came in and testified and the Southern Pacific Company was on the other side, where you said the man would get well?

Mr. Nichols: Object, Your Honor, as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Mr. Messner: No more questions.

(Testimony of Lloyd Delbert Fisher.)

Redirect Examination

Mr. Nichols: Q. Doctor, when you made the examinations here, in your neurological examinations, that is, to determine whether a man has any beginning of paralysis, isn't that true?

A. Yes, that type of thing.

Q. In other words, to make a complete examination you do that in order to rule out the possibility of contributing causes for disability, is that not correct?

A. That is correct.

Q. Is most of the work that you get referred by the doctors?

A. Yes.

Mr. Nichols: I think that is all.

Mr. Messner: No more questions.

The Court: Call your next witness. [63]

Mr. Nichols: Do you want those X-rays, Mr. Messner?

Mr. Messner: No.

Mr. Nichols: You may take them with you, Doctor.

JOHN BLAZIN

the plaintiff herein, recalled as a witness in his own behalf, having been previously duly sworn, testified further as follows:

Mr. Messner: May I proceed?

The Court: You may.

Cross Examination—(Continued)

Mr. Messner: Q. Mr. Blazin, I would like to find out a little bit more about this accident, just why or where it happened and how it happened, and

(Testimony of John Blazin.)

so forth. Now, as I understood your testimony on direct examination, the various cars had been in on Track No. 34, is that correct, sir?

A. That is right.

Q. Your locomotive went in on this track and coupled onto eight cars that had been standing there, is that true, sir?

A. That is right.

Q. And I believe, you said you were following the engine, is that right, sir?

A. That is right.

Q. Now, so the jury will understand that, that means that you are the man that was working with the engine and closest [64] to the engine and making the couplings of cars to the engine, is that true, sir?

A. That is true.

Q. So that when the locomotive came in against these eight cars you were the man who made the coupling here?

A. That is right.

Mr. Nichols: Keep your voice up loud, Mr. Blazin.

Mr. Messner: Q. Now you had on that crew an engine foreman, I believe you said he was down here?

A. That is right.

Q. You also had another man on that crew, a Mr. Moulton, did you not? Where was Mr. Moulton?

A. At the time I coupled onto the cars Mr. Moulton walked back to make a cut behind this car.

Q. Mr. Moulton had been up here?

A. He walked back there to make the cut.

Q. I see. Now, after that, at the time of the accident, do you know where Mr. Moulton went?

(Testimony of John Blazin.)

A. He walked down the lead to line the switches.

Q. He walked down this direction?

A. No, he came out and walked——

Q. He came back over here?

A. That is right, and then walked down the lead.

Q. I see. Well, when the locomotive came off—Strike that. When the locomotive went into Track No. 34 who lined the [65] switch?

A. Either I or the foreman, I am not sure.

Q. One of the two of you lined the switch. Then, so that the jury and I will understand this now, you pulled eight cars out on this lead track, is that right? A. That is right.

Q. Now, the engine would be coupled to this end of cars and there would be eight cars along in here, between this switch and the locomotive would be eight cars, is that correct, sir? A. M-hm.

Q. All right now, after the cars got out of this track you were going to move down this direction, and in order to move that direction someone has to throw the switch to the 34 track?

A. That is right.

Q. Who threw that switch?

A. The foreman.

Q. The foreman threw that switch? Now, when the cars came out you were standing alongside of the lead track, the engine and number of cars must have passed by you. Do you know what car you were opposite when the cars came to a stop?

A. I was within about ten feet of the rear car.

(Testimony of John Blazin.)

Q. Ten feet of which end of the rear car?

A. That would be the east end. [66]

Q. The rear end of the rear car then?

A. No, that would be the end where they were connected together.

Q. That would be this end back this way?

A. That is right.

Q. In other words, the car is coupled here and you were ten feet from this end of the car, is that right?

A. Approximately.

Q. All right. Now, when the cars got clear of this switch someone gave a signal to the engineer to stop. Who gave that signal?

A. The foreman I suppose.

Q. The foreman gave the signal? Are you sure about that?

A. Well, he would—it would be his duty to.

Q. Might not it also be your duty to give the signal?

A. At the particular point where I was at I was out of the view of the engineer, there is a double curve there.

Q. The engineer could not see you at this point then?

A. No.

Q. All right. After these cars had been pulled back here and the foreman gave a signal to cut one, now, you have in railroad parlance what you call a "kick", you shove a car and cut it loose and let it roll free? Isn't that what a kick is?

A. Yes, sir. [67]

(Testimony of John Blazin.)

Q. Now, did you intend to kick the car on down to some other track down here?

A. That was the intention.

Q. You intended to kick it down here, you didn't intend to push it clear of this switch and then shove the one in—

Mr. Nichols: Well, that would be the engineer that would determine that, wouldn't it?

Mr. Messner: No, sir, it would not.

Mr. Messner: Q. So, you intended to kick that car on down through there. All right, now, Mr. Blazin, have you worked in that portion of the West Oakland Yard for any great period of time in your experience as a yardman?

A. On different occasions I have.

Q. You have worked there considerable periods of time. Have you ever been permanently assigned to a job in that area?

A. I have. I have been.

Q. For how long a period of time?

A. Oh, a month, six weeks. Sometimes two months.

Q. Well, if you have been assigned permanently in that area then I assume that you are aware that Track No. 34 is a track that you sometimes find with a derail up on the rail, don't you?

A. I have never seen a derail in there.

Q. You have never seen one on Track 34?

A. There is no derail. [68]

Q. Did you ever see them repairing cars on Track 34? A. No, sir.

(Testimony of John Blazin.)

Q. Ever see the pullman company in there repairing cars?

A. I seen electricians going into the cars. I don't know exactly what they were doing.

Q. You saw men working around the cars?

A. Well, the Pullman Company changing towels and linen.

Q. I see. Now, down in—I think this track is just a little bit different here. I am not quibbling with your drawing, Mr. Nichols, but I think that it comes off more like this and then there is some other tracks coming out this way. And that right down in here there is a track known as Track No. 20, is that right?

A. No, track 20 is up on the 28 lead.

Q. Oh, then it comes off this way, is that right?

A. That is right.

Q. Well, is that where you are going to take the car Charlotteville, up on Track No. 20 on this occasion?

A. I didn't know. I knew we were going to kick it up 28 lead.

Q. You are sure you didn't know?

A. That is right.

Q. Now, what is Track No. 20 generally used for, Mr. Blazin?

A. It's a storage track so far as I know, all of those tracks are. [69]

Q. Isn't it a fact that the Southern Pacific Company does their repair work on 20, 22, and down in this area of the yard?

(Testimony of John Blazin.)

A. Well, the Pullman Company does their linen work. I don't know just——

Q. But that is up in here, 34, 36, and 32, is it not, Mr. Blazin?

A. It is throughout the whole yard, sir.

Q. In other words, I believe you testified on direct examination that the only Pullman cars you have in here are those that are out of service, isn't that right, sir?

A. Well, some cars are only out of service for only an hour or two, until they——

Q. Well, that may be true, sir. But, while they are out of service that is where they would be, is that right? A. That is right.

Q. And some of them may be in there for a month out of service, is that right, sir?

A. That is right, sir.

Q. Now, I would like to show you if I may—. Do you have any objection to this?

Mr. Nichols: None at all.

Mr. Messner: May I approach the witness, Your Honor?

The Court: You may.

Mr. Messner: Q. I show you this form 2611 and ask you to look it over for a moment. [70]

(Handing document to witness.)

Mr. Messner: Q. Now, this form 2611, Mr. Blazin, is that a report that you made of this accident? A. Yes, sir.

Q. Is it made in your own handwriting?

A. Yes, sir.

(Testimony of John Blazin.)

Q. Is it signed by you? A. Yes, sir.

Q. And was it made on the same day that the accident occurred? A. Yes, sir.

Q. And this report, in this report, didn't you indicate that you were making this move from Track No. 34 to Track No. 20?

A. That was—I made the report out after the injury and that is when I knew exactly what our move was, and stated our move as it was going to be.

Q. That is fine. I don't want you—

Mr. Nichols: Counsel, I have no objection to putting the report in evidence.

Mr. Messner: All right. May this be introduced into evidence?

The Court: It may be entered.

(Whereupon the above referred to document was received in evidence as Defendant's Exhibit A.) [71]

Mr. Messner: Q. Now, that you were making a move into track 20, were you not?

A. Yes, sir.

Q. And Track No. 20 is a repair and maintenance track, is it not, sir?

A. It is a storage track so far as I know, sir.

Q. Well, isn't it a fact that you were actually washing some passenger trains on this day?

A. We pull them through the wash rack with the engine.

Q. Yes. Isn't that what you had been doing?

A. Well, that was in our normal tour of duty to

(Testimony of John Blazin.)

pull trains through the wash track and switch them.

Mr. Messner: Would you like to take the afternoon recess?

The Court: We will take the afternoon recess. Again I admonish you not to talk about the case, form or express any opinion about it until it is finally submitted to you.

(Short recess.)

The Court: Proceed.

Mr. Messner: Will you resume the stand, Mr. Blazin?

Mr. Messner: Q. Now, just to go back for a moment, Mr. Blazin, my understanding is that as far as you are concerned then, it is your testimony that these tracks in this area, 34, 36, 32 are storage tracks? A. That's right.

Q. Track No. 20 down here is also a storage track? [72] A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Q. Now, when you say storage track you mean it is a track, that is the name of a nominal thing that you refer to as a storage track is that right?

A. That's right.

Q. Do you know what those tracks are used for?

A. To store the cars.

Q. Do you know what is done with the cars while they are stored, or doesn't your experience go that far?

A. They are cleaned to be ready to go on their next trip.

(Testimony of John Blazin.)

Q. They are maintained and cleaned and repaired, is that right?

A. Well, I don't know just what the repair men do, I know they are cleaned.

Q. You know they are worked on?

A. That's right.

Q. All right, sir. In connection with the accident itself, my understanding is that you took ahold of the grabiron with your left hand and stepped up onto the steps of the pullman car as it was still standing still, is that correct, sir?

A. Yes, sir.

Q. And at about that time the train started to move, is that [73] right? A. Yes, sir.

Q. And when the train started to move you reached with your right hand for a grabiron and you didn't find a grabiron was there, is that right?

A. That's right.

Q. When that occurred you swung around, your back was struck by the corner of the car behind you? A. That's right.

Q. Now, do you know what kind of a car it was that struck you? Was it one like the Charlottesville, another pullman car?

A. It was another pullman car.

Q. Was it another green pullman car?

A. Yes, sir, I believe it was.

Mr. Nichols: Mr. Blazin, I don't hear you well.

The Witness: I say: Yes, sir, I believe it was.

Mr. Nichols: Thank you.

The Witness: (Continuing) Another green one.

(Testimony of John Blazin.)

Mr. Messner: Q. I have two photographs here—do you have any objection?

Mr. Nichols: No. I want to explain that is after they put the grabiron back on.

Mr. Messner: Yes, we are not maintaining this was a picture of the car as it was on the day of the accident, just for the purpose of illustration.

Mr. Messner: Q. Now, as I understand your testimony on direct examination, your feet had both slipped off the step and both feet were on the ground and you then swung around backwards and struck the car, is that true, sir?

A. That's right.

Q. You said that you were knocked down; were you knocked down flat on the ground?

A. Yes, I was knocked down on the ground when I got hit in the back.

Q. Did you fall on your face, on your back, or how did you fall? A. On my hands.

Q. On your hands and knees?

A. Yes, sir.

Q. Were you knocked unconscious?

A. No, sir.

Q. Did anyone see you while you were on the ground?

Mr. Nichols: That calls for a conclusion. We object to it on that ground.

The Court: Objection sustained.

Mr. Messner: Q. Where was the foreman when this accident occurred?

A. Approximately by 34 switch.

(Testimony of John Blazin.)

Q. I think you said that is about one hundred feet away? A. Yes, sir. [75]

Q. Now, after you were knocked down on the ground, Mr. Blazin, did the cars keep going or did they stop?

A. The foreman stopped the cars; either he or I.

Q. Either what?

A. Either he or I, as I went down,—I don't know what happened, but the cars had stopped.

Q. How quickly did they stop?

A. Well, it was within seconds.

Q. You say either he stopped them or you stopped them. Did you give a stop signal?

A. I don't remember when I got hit; I don't remember just what did happen.

Q. I see. Were you in a place where the engineer could have seen you knocked down?

A. Possibly, as I was knocked out in the way, he might have, I don't really know.

Q. It was daylight, was it not?

A. All right. I am going to show you a photograph of the car involved, marked Defendant's Exhibit C. Now, that is the car that you were working on at the time you were injured. I believe you testified this morning that the vestibule door was open on the car, is that correct, sir?

A. Yes.

Q. And the trap door was up, too, wasn't it, sir?

A. Yes, sir. [76]

Q. Now, so that the jury might understand what the vestibule door is and what the trap door is and

(Testimony of John Blazin.)

what the steps are, I would like to pass this picture to the jury if I may, your Honor.

Mr. Nichols: Is that door open there or closed?

Mr. Messner: It is closed in that photograph.

Mr. Nichols: Do you have one that is open?

Mr. Messner: I think not. (Passing exhibits to the jury.)

Mr. Messner: Q. Now, the corner of the car behind you, you say, struck you in the back, starting from back of your head on down. How far did it go, Mr. Blazin?

A. I imagine all the way down just as—well, below the waistline.

Q. Clear down below the waistline?

A. That's right.

Q. Did you have bruising of your spine all the way down, did it get black and blue?

A. Not to any—I couldn't see it.

Q. Now, Mr. Blazin, you laid off four days after this accident, or three days, something like that, went to see Dr. Gates?

Mr. Nichols: Worked three days and then laid off, isn't that it, counsel?

Mr. Messner: I beg your pardon, that is correct.

Mr. Nichols: He worked three days and then went to the doctor.

Mr. Messner: I got confused.

Mr. Messner: Q. You worked some two or three days and then you laid off and went to Dr. Gates. Now, isn't it a fact, Mr. Blazin, when you went to Dr. Gates and while you were off the latter part

(Testimony of John Blazin.)

of September and the first part of October you had Mumps?

A. Doctor Gates said I had a swelling of the glands; whether it was Mumps or not I don't know.

Q. At any rate, why, you had some swelling of the glands in this area, did you not?

A. Yes.

Q. You stayed home and were treated for that condition by Dr. Gates?

A. About a week I believe.

Q. How long were you confined to your home because of that condition?

A. I believe about a week, I was in bed.

Q. You were in bed about a week, and that was right after you laid off, was it not, sir?

A. Oh, approximately two weeks after I laid off, something like that.

Q. Now, I would like to—May I approach the witness, your Honor? [78]

I have this picture marked, Mr. Blazin, and this is still Defendant's Exhibit C. There is a lever coming down at the bottom of the car here and a v-shaped affair, and I am going to put a B-3. Now, what is that lever?

A. That is the cutting lever.

Q. That is the cutting lever, that is the lever you were going to lift up so the cars would come apart?

A. That's right.

Q. All right, sir. Now, your feet were both on the bottom step, is that right, sir?

(Testimony of John Blazin.)

A. I believe I had them both up, I am not quite sure.

Q. All right. And to the left of the lead car is a grab iron, that is the one you had ahold of with your left hand, is that right? A. Yes.

Q. Mark that B-4. And to your right in this photograph is another grab iron. Mark that B-5. is that the one that you were reaching for but you didn't find there? A. That's right.

Q. I see. Then back here on the trailing car, see an edge of the car coming down, and understand I don't contend this is the same car, this is the portion of the car that hit your low back here, is that right, sir? A. That's right.

Q. And make an arrow to that, mark that B-6. Thank you, [79] Mr. Blazin. Now, there seems to have been some misunderstanding about a matter, Mr. Blazin. You recall when your deposition was taken, do you not?

A. When it was taken?

Q. When your deposition was taken?

A. Yes.

Q. And you recall on that occasion you were represented by your attorney? A. Yes, sir.

Q. Mr. Digardi was present, the deposition was in Mr. Nichols' office, was it?

A. I believe it was taken in Dunne-Dunne.

Q. Taken at Dunne, Dunne and Phelps. All right. But your attorney was present?

A. Yes, sir.

Q. You remember that on that occasion you were

(Testimony of John Blazin.)

sworn by a Notary to tell the truth, just as you have been sworn here today? A. Yes, sir.

Q. And you were asked questions by an attorney for the defendant? A. Yes, sir.

Q. At that time, and before the deposition started the attorney for the defendant Railroad had told you that if you didn't understand the questions to let him know and he would [80] try to clear them up, isn't that right, sir?

A. That's right.

Mr. Messner: This is page 42, line 13.

Mr. Messner: Q. Mr. Higgins, who is from our office, who took this deposition, asked you a question about Doctor Fisher and he says:

"Question: Who sent you to Dr. Lloyd Fisher?"

The Court: Mr. Messner, I prefer you show the deposition to the——

Mr. Messner: I beg your pardon, Your Honor.

The Court: ——witness and let him read it, then ask questions about it. I think it is a more satisfactory way of doing it.

Mr. Messner: Q. I show you the deposition then, starting on page 42, line 13, and ask you if that question was asked you and that answer given?

A. I gave that answer.

Q. Thank you.

A. Mr. Higgins asked you:

"Question: Who sent you to Dr. Lloyd Fisher?"

"Answer: Mr. Nichols and Mr. Digardi."

Is that true?

A. Yes, sir. I called and made the appointment

(Testimony of John Blazin.)

and Mr. Digardi and—Mr. Nichols then gave me a list of doctors I might choose from. [81]

Q. I believe this morning you testified as to the amount of money that you had earned and been earning. I think you said you had been earning something like \$430 a month gross, is that right, sir?

A. It differed every month, although on the average I should say that was about right. Some months——

Q. That would be, something around \$5,000 a year? A. That's right.

(Counsel showing papers to other counsel.)

Mr. Nichols: No objection to these if you tell me they are taken from the company books on what he made.

Mr. Messner: They are.

Mr. Nichols: You have one for the year, whole year prior?

Mr. Messner: I think I have. Just a moment.

(Colloquy between counsel, inaudible to the reporter.)

Mr. Nichols: This is '52. That would show——

Mr. Messner: 4160 gross and 3690 net.

Mr. Nichols: All right, I have no objection to those.

Mr. Messner: May these be placed in evidence, then, Your Honor, marked Defendant's Exhibit next in order?

The Clerk: Defendant's Exhibits D, E, and F.

(Testimony of John Blazin.)

(Whereupon documents referred to above were admitted into evidence as Defendant's Exhibits D, E, and F.)

Mr. Messner: Q. Now, Mr. Blazin, you had an incident [82] in September of 1953 in which you injured your back, is that correct, sir?

A. My back went out, yes, sir.

Q. And at that time you were throwing a switch, is that right? A. That's right.

Q. Now, at the time that incident occurred, you made an accident report, did you not?

A. Yes, sir.

Q. Just the same as you had made when you were injured September 15, 1952?

A. Yes, sir.

Q. When you made that accident report, Mr. Blazin, did you on that report state that you had simply pulled a muscle because that had been previously injured, or did you say you injured your back?

A. I don't recall just what I did say. Probably mentioned that my back had been——

The Court: Keep your voice up, Mr. Blazin.

A. (Continuing) ——probably mentioned that my back had been out, I don't know just what I did state on the——

Q. At that time, you were throwing a cross-over switch from the Homestead to the 50 lead, is that right? A. That's right.

Mr. Nichols: Counsel, if you have a copy of the

(Testimony of John Blazin.)

report [83] I have no objection to it going in if you will let me see it first.

(Counsel showing documents.)

Mr. Nichols: I have no objection. You can use this copy instead of the original if you like, if it will be of help to you.

Mr. Messner: All right. May I approach the witness, Your Honor?

Mr. Messner: I show you this 2611, which is a report of the incident that occurred September 22. Is that your signature, Mr. Blazin? A. Yes, sir.

Q. Is the balance of the form in your handwriting? A. Yes, sir.

Q. That is a report that you made of the incident? A. Yes.

Q. Could you show me on there where you indicate this was just a sprain caused by some back condition you had before?

Mr. Nichols: Just a moment. If the Court please I object to that, the report is the best evidence of what is on it.

The Court: Sustained.

Mr. Messner: Q. Mr. Blazin, you did not show on this report that there was a previous injury. Did you tell any of your fellow employes it was a previous condition that caused [84] your disability that started September 22, and I am talking about at the time this incident occurred?

A. I don't recall if I did or not.

Mr. Nichols: What is the date of that report?

The Court: September 22 of 1953, 3:25 p.m.

(Testimony of John Blazin.)

Mr. Messner: I have no further questions at this time of Mr. Blazin, Your Honor. I would like to offer this in evidence.

The Court: Let it be received in evidence and marked.

The Clerk: Defendant's Exhibit G in evidence.

(Whereupon Form 2611 referred to above was admitted into evidence as Defendant's Exhibit G.)

Redirect Examination

Mr. Nichols: Do you have the original report that was filed, Mr. Clerk? There was another filed on this accident that was offered in evidence.

Did you take an original report that was put in evidence? Maybe I did.

Mr. Messner: Which report is that?

Mr. Nichols: The report of this accident.

Mr. Messner: No, I didn't have the original report.

The Clerk: Defendant's Exhibit A.

Mr. Nichols: Your Honor, may I read this exhibit to save time instead of passing it to the jury?

The Court: I think you made the suggestion to Mr. Messner that you wanted to use the original, is that correct?

Mr. Nichols: Yes, Your Honor, that has been marked and received as Exhibit G.

The Court: Let it be received in evidence and you may read from it.

Mr. Nichols: (Reading)

"Division Western. Nearest Station West Oak-

(Testimony of John Blazin.)

land. State of California. Nearest mile post blank. Date of accident 9/22/53. Time of accident 2:25 P. Weather was clear, no rain or snow. Daylight. Kind of train, Yard. Train No. 1441. Engine No. 1441. Direction stop. Casualties to persons. Name and address. John B. Blazin. Age 27, Male, Married, Yardman, back injury. Name and address of witnesses; if employe, give occupation. Mullins, Engineer—Newman, Fireman—Geagan, Foreman—Jones, Yardman. What was done with or for injured persons. Saw Dr. Stepman. By whose direction, own. Name and address of attending doctor, 144 San Joaquin, San Leandro. What did injured person say as to cause of accident: throwing cross-over switch at Homestead from 50 Ld. Twisted or strained back. Who was present when statement was made? Blank. Could accident have been avoided, that is blank. If so, [86] how, blank. Did any jerk or rough handling or train cause or contribute to accident, no is written in there.”

Then they have a number of things, “Main, siding or yard track,” and it says “yard”. “Straight or curved, right or left” and it says “straight.” “Distance run after accident,” none. If shoving or backing cars, who was on leading car, stopped” it says.

“Detail of cause and circumstances. Stepped off engine to” —I don’t read this. May I ask the witness, Your Honor?

Q. What is this “stepped off engine to”——

A. Line.

(Testimony of John Blazin.)

Q. "Line switch to cross over from 50 lead Homestead to the pile or 70 lead. During the process of throwing switch got a pain in my back and was unable to straighten up."

That is signed John B. Blazin, 9/22/53. That is the date, Mr. Blazin, that incident occurred, is it not? A. Yes, sir.

Q. Now, you're required, if any condition of that kind arises to make a report and advise the company? A. Yes, sir, at all times.

Q. And did you thereafter go to the Southern Pacific doctor or advise him what had happened?

A. Yes, sir. [87]

Q. Now, you were asked about Dr. Fisher. Actually, you just tell the ladies and gentleman what—withdraw that.

At the time that you were seeing Dr. Fisher had you yet employed a lawyer? A. No, sir.

Q. And I am going to ask you when you made the request of me for the name of a doctor if I didn't give you the name of four doctors?

A. Yes, sir, four doctors, and I might use any that I wish, or any other doctor that I might get of my own accord.

Q. And I gave you the name of a doctor that did a lot of work for the Southern Pacific Company, didn't I? A. Yes, sir.

Q. Have you got the card with that on it now?

A. Yes, sir, I do, I think.

Q. That is the card we showed these gentlemen today, at noon, isn't it? A. Yes, sir.

(Testimony of John Blazin.)

Q. Let me have the card. And the names of the doctors I gave you was Dr. Dickson, Dr. Toffelmier, and Walker, Dr. Fisher and Dr. Bellamy?

A. That's right.

Q. And you made your own selection as far as a doctor was concerned, isn't that right?

A. I called Doctor Fisher and made my own appointment. [88]

Q. And even sent you to Dr. Bechtel, who is sometimes employed by the SP?

A. That is right.

Mr. Nichols: Have you any objection to this going into evidence?

Mr. Messner: No.

The Court: Let it be received and marked.

Mr. Nichols: There was one other report—

The Clerk: Plaintiff's Exhibit 2 in evidence.

(Whereupon the card bearing names of doctors referred to above was admitted into evidence as Plaintiff's Exhibit No. 2.)

Mr. Nichols: That is all, Mr. Blazin.

The Court: Further questions, Mr. Messner?

Mr. Messner: Not at this time, Your Honor.

The Court: You may step down. Call your next witness.

Mr. Nichols: Mr. Moulton.

OLIVER A. MOULTIN

called as a witness on behalf of the plaintiff, being first duly sworn to tell the truth, the whole truth and nothing but the truth testified as follows:

The Clerk: Q. Please state your name and occupation for the record.

A. Oliver A. Moulton. [89]

Direct Examination

Mr. Nichols: Q. Mr. Moulton, will you tell His Honor and the ladies and gentlemen where you are employed?

A. Sir, I didn't hear the question.

Q. Will you tell us where you are employed?

A. Oh, I am employed by the Southern Pacific Company at Oakland.

Q. And were you employed on the train crew that was making, switching some cars out of Track 34 on September 15, 1952 when Mr. Blazin was injured?

A. Yes, sir.

Q. And what was your particular task with that crew?

A. I was the field man.

Q. And just what did your duties involve?

A. My duties as field man was to pull the pin on that car and send the car out and line up the switches for us to come on down the lead.

Q. Now, do you remember the day, it was a clear day?

A. Sir?

Q. Do you remember the day was a clear day?

A. Yes, it was, I believe.

Q. And we have a rough sketch that we put on the board here that represents the old main line

(Testimony of Oliver A. Moulton.)

and this is supposed to be the track that goes off of the various leads, we placed the wash rack here, track 36, and then 34, 32 and 30, and then [90] 28 and down to 20. Is that generally the manner in which those tracks are arranged in the West Oakland Yard?

A. Yes, that's the general idea.

Q. Do you remember the engine going down Track 34 bringing out eight Pullman cars?

A. Yes, sir.

Q. And could you tell us about where you were when the cars were pulled out of the 34 lead?

A. Well, I made a cut on the cars and then walked across to the 28 lead. If I remember right, we had came off on a track, which is 28 lead down to where you got that track going out to the right, off the 28 lead there, and the switch was wrong and I had to walk across and line that switch.

Q. I see. When you say you made a cut of cars, what do you mean by that?

A. Well, I pulled the pin on the car and gave him a sign to come out with it.

Q. Were there more than eight cars on the 34 lead?

A. Yes, sir.

Q. And you have to disconnect the No. 8 car from the 9th car, is that right?

A. That's right.

Q. All right. And so after pulling the pins for the eight cars, you were free to start over in the direction of the 28 lead? [91]

(Testimony of Oliver A. Moulton.)

A. That is right, to line the switches over there.

Q. Now, did you see the accident itself?

A. No, sir.

Q. What was the first indication that you knew that an accident had occurred?

A. Well, I knew something was wrong in that they didn't come right down with the car after they switched it out and I started up that way and I met him coming down and I was told John had been hurt due to the grab iron missing on the car.

Q. Did you yourself see the car?

A. Yes, sir.

Q. And was there a grab iron missing?

A. Yes, sir.

Q. Did you see John—Mr. Blazin right after the accident happened? A. Yes, sir.

Q. And would you just tell us what his appearance was?

A. Well, I'd say he was pale and nervous and kind of shaken up a little.

Q. Did you try to talk to him?

A. Yes, I talked to him, asked him if he was hurt bad.

Q. Pardon me?

A. Asked him if he was hurt bad. Told him he had better go to the hospital. [92]

Q. Did he answer back to you clearly?

A. Well, he was a little confused, I believe.

Q. Did he ultimately go to the hospital?

A. Yes, sir.

Mr. Nichols: I think that is all.

(Testimony of Oliver A. Moulton.)

Cross Examination

Mr. Messner: Q. Mr. Moulton, how long have you been working as a switchman for Southern Pacific?

A. Since September, 1941.

Q. Since September, 1941? A. Yes, sir.

Q. How long have you worked in and around the West Oakland Yard? A. Well, since 1950.

Q. I see. A. In the passenger yard.

Q. You have worked considerably in the area where this accident occurred? A. Yes, sir.

Q. Well, the car in question was taken off 34 track and was to be taken down to Track No. 20, is that right, sir? A. Yes, sir.

Q. Now, this is generally what is referred to as the passenger yard? [93] A. That's right.

Q. In that area, isn't it? A. That's right.

Q. Now, Track No. 34, 36, and also 32 to a limited extent, 34 is a track where you find pullman cars quite frequently, isn't that correct?

A. Yes, 34, 6 and 32.

Q. All three of those tracks?

A. 38 and 39 also.

Q. 38 and 39? A. Yes, sir.

Q. Particularly, with reference to Track No. 34, isn't that a track where they do a lot of electrical repair work on pullman cars?

Mr. Nichols: That would be incompetent, irrelevant and immaterial, if the Court please. I see no purpose in that question.

The Court: Overruled.

(Testimony of Oliver A. Moulton.)

The Witness: What is the question?

(Record read by the reporter.)

A. They change the generators there and batteries on the pullman cars there on 34.

Mr. Messner: Q. And haven't you come in there on occasion and found a derail on this track so you would have to go down—— [94]

A. You have to have a derail when you are doing repair work.

Q. You have to have a derail?

A. Yes, sir.

Q. You have been around there and found them there yourself, isn't that right? A. Yes, sir.

Q. Before you can go in you have to go and see the Yardmaster and get specific authority so that somebody can remove the derail?

Mr. Nichols: If the Court please that is entirely incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Mr. Messner: Q. Now, Mr. Moulton, down in 20 track, in that area, is an area where the Southern Pacific washes and maintains cars, is it not?

A. I wouldn't say so, I don't believe so. All tracks over there in the Southern Pacific are repair tracks in this area.

Q. Pardon me?

A. Repair tracks in this area.

Q. Pardon?

A. All tracks in a sense.

Q. Now, you didn't see the accident?

A. No, sir.

(Testimony of Oliver A. Moulton.)

Q. How long after the accident was it before you saw Mr. Blazin? [95]

A. I'd say between five and ten minutes.

Q. I see.

Mr. Messner: No more questions.

Redirect Examination

Mr. Nichols: Mr. Moulton, are those tracks also used for storage tracks?

A. Which tracks is that, sir?

Q. 34, 36 and 30, 28?

A. Are they used for storage tracks, you say?

Q. Yes. A. Yes, they are.

Q. And are the linens on the pullmans occasionally changed there? A. What is that?

Q. Are the linens and towels changed?

A. 34?

Q. Yes. A. 34 and 36. Yes, sir.

Mr. Nichols: I think that is all.

The Court: Step down, please. Next witness.

(Witness excused.)

Mr. Nichols: That is all, Your Honor. Will Your Honor adjourn at 4:00 o'clock? I have another witness in the morning. A very short witness, will not be a medical man, [96] will be a lay witness.

The Court: Are you out of witnesses?

Mr. Nichols: Yes, Your Honor.

The Court: Adjourned, ladies and gentlemen of the jury until 10:00 o'clock tomorrow morning. Please observe the admonition that I must of necessity give you. Do not talk about the case, don't

(Testimony of Oliver A. Moulton.)
form or express any opinion about it until it is
submitted to you. Tomorrow morning at ten o'clock.

(Whereupon an adjournment was taken until
Tuesday, November 23, 1954 at 10:00 o'clock
a.m.) [97]

Mr. Nichols: Ready, Your Honor.

Mr. Messner: Ready, Your Honor.

The Court: Proceed.

MRS. JOHN BLAZIN

called as a witness on behalf of the plaintiff, having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct Examination

Mr. Nichols: Q. Will you state your full name and occupation for the record?

A. Mrs. John Blazin, I am a housewife.

Q. This is your first trip in Court, is it not, Mrs. Blazin?

A. Yes, sir.

Q. Your husband is John Blazin?

A. Yes, sir.

Q. How long have you and Mr. Blazin been married?

A. Nine years.

Q. And will you tell His Honor and the ladies and gentlemen of the Jury what his general health was prior to the accident of 1952, September 15 of 1952?

A. Well, it was good. He was always healthy. He did have an appendix operation but he was back

(Testimony of Mrs. John Blazin.)

to work in about a month. [99] And he used to have a garden and chickens.

Q. How large a garden did you people have?

A. About a half acre.

Q. Who built the house that you live in?

A. My husband, his father helped.

Q. Who took care of it, in addition to the garden were there any livestock? A. Chickens.

Q. And who took care of those?

A. My husband.

Q. Now, since the accident have you noticed any change in him?

A. Yes, we don't have a garden any more and have gotten rid of our chickens. He don't seem to be able to keep it up.

Q. What about the maintenance of the house, is he able to do that work?

A. No, not as well, not as much as he used to.

Q. Prior to his accident, was he one that ever complained at all? A. No, no.

Q. Since the accident, has there been any home treatment rendered to him by reason of the accident?

A. We have a heat lamp, and heating pad, and quite often takes these hot baths because they would relieve him. And I would rub analgesic balm, a doctor gave us that. [100]

Mr. Nichols: I think that is all.

Mr. Messner: No questions.

Mr. Nichols: That is all, Mrs. Blazin.

That is the plaintiff's case, Your Honor. The plaintiff will rest.

Opening Statement by Mr. Messner

Mr. Messner: If the Court please, Mr. Nichols, ladies and gentlemen of the Jury, at this stage of the proceedings the defense counsel has an opportunity to tell you what he thinks the proof is going to be, and what is going to be shown by the remainder of the evidence in the case. From here on the case will be rather brief.

We believe that in the first place that this action is brought on the Federal Safety Appliance Act. As His Honor has already told you, that this is the act that imposes absolute liability on the character——

A Juror: We can't understand it.

Mr. Messner: (Continuing) ——imposes absolute liability on the character, where the cars that are in use on its lines are not equipped in accordance with certain specifications.

Now, by the pleadings we have admitted that the car in question was not so equipped. The only remaining question is, whether or not this car was in use on our lines within the meaning of the Safety Appliance Act. [101]

We believe that the evidence has already shown that the car was in a repair area in the yard. And, I believe, that you will recall that the evidence has shown that the car was out of service, it was not in use in interstate commerce within the meaning of the act. We believe the evidence will show that the

car, Charlottesville, had been withdrawn from service by the Pullman Company who owned the car as distinguished from the Southern Pacific Company some two weeks before this accident occurred. And that the car was placed on Track No. 34 in what is known as the Passengers Yard, West Oakland. And the car which was placed there for the purpose of being generally refurbished and overhauled. We believe the evidence will show that during the course of these repairs, which consisted of repainting, reupholstering and other items of repair to modernize the car. During the course of those repairs it was necessary, and the car was moved from Track No. 34 down to Track No. 20, where certain other repairs were to be made, and were, in fact, made. Thereafter the car was returned to Track No. 34 and on October 5, twenty days after this accident, the car was then returned to service and put in use on the lines of the Southern Pacific Company. We believe that that is what the evidence will show.

Now, there has been claim here in connection with certain injuries. There was an accident on September 15th, 1952, and that is the only accident that is the subject of this lawsuit. [102] We believe that the evidence has already shown that there was an accidental injury on September 22nd, 1953. There was something said about a hernia in May of 1953. We believe the evidence has already shown from Dr. Fisher that that hernia was not in existence of October, 1953. We believe that the evidence will show that Mr. Blazin was examined later by a Dr. William Sheppard, Oakland orthopedic surgeon.

Well, rather than tell you what that evidence will show I will have the Doctor in here and he will tell you what he found, and he will give you his conclusions and opinions in connection with Mr. Blazin's health.

I believe that that substantially is what the evidence for the balance of the trial will show, ladies and gentlemen.

Thank you.

WILLIAM J. WELCH

was called as a witness on behalf of the defendant, and being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

The Clerk: Will you state your name and occupation for the Court and Jury?

The Witness: William J. Welch, foreman for the Pullman Company in Oakland. [103]

Direct Examination

Mr. Messner: Q. Mr. Welch, how long have you been employed by the Pullman Company in Oakland?

A. I have been with them over nineteen years, sir.

Q. Now, you do not work for the Southern Pacific Company, do you? A. No, sir.

Q. Now, what has been your place of employment during these nineteen years that you have worked for Pullman Company?

A. I worked the entire time in the Oakland yard, sir.

(Testimony of William J. Welch.)

Q. Now, September 15th, 1952, Mr. Blazin, who was the plaintiff in this action was injured in Oakland, West Oakland Yard; were you a witness to that accident? A. No, sir, I wasn't.

Q. Are you familiar, generally, with the tracks in what is known as the Passenger Yard of West Oakland? A. Yes, sir.

Q. Are familiar with the track that is known as Track No. 34? A. Yes, sir.

Q. In your job as foreman with the Pullman Company, do you or do you not have charge of the repairs to cars, pullman cars, that come into West Oakland Yard? A. Yes, sir, I do.

Q. And do you have occasion to make repairs on Track No. 34?

A. Yes, sir, quite often. We make repairs there.

Q. Do you make repairs on Track No. 32?

A. Yes, sir.

Q. You make repairs on Track No. 36?

A. Yes, sir.

Q. Now, in September of 1952, did your company have a program afoot for modernizing and refurbishing cars?

Mr. Nichols: I object to that as incompetent, irrelevant, and immaterial. I, in my opening statement, was going to make a showing that this car had no bad order on it, no bad order sign, and Counsel objected to that. He said that I was without an issue. That negligence was not a matter of issue, limited entirely to the Safety Act. Now, in view of that statement, the defense that he is at-

(Testimony of William J. Welch.)
tempting here, this car was not in service, just doesn't *ly* under the act. If the Court please, the car that was under repair, and to say that the car—that the plaintiff was not working under the provision of the act.

The Court: Do you wish to be heard?

Mr. Messner: If the Court please, and I think perhaps it is a matter—I don't know whether it should be taken up in the presence of the Jury or not.

The Court: It is a matter that I want to take up in the absence of the Jury.

You may be excused for a few minutes, ladies and gentlemen.

(Whereupon the Jury left the Courtroom and the [105] following proceedings were had outside the presence of the Jury.)

The Court: I want to say first of all that I have anticipated this matter. And my views on this particular phase of the case are as follows:

Whether or not this car was in the Oakland yards for purposes of repair or not makes no difference in the opinion of this Court. The Safety Appliance Act was designed by Congress to protect workmen and this man was working.

There were, apparently, no bad order indications or signs on the car, and whether there were or were not, Mr. Blazin, if he is to prevail here at all, is certainly entitled to the full coverage of the Safety Appliance Act as designed to give him. I don't think it makes any difference whatsoever whether

(Testimony of William J. Welch.)

it was in there for refurbishing or for repairs, it was still engaged in interstate commerce, was being readied for interstate commerce and was actually in interstate commerce. And I hold that actually as a matter of law.

Mr. Messner: Well, if the Court please, there have been numerous decisions, various appellate court in connection with this matter.

The Court: That is my decision, just what I have said.

Mr. Messner: If that is the decision of Your Honor, there is no use of pursuing the matter.

The Court: Not a particle because I don't intend to [106] entertain that sort of a defense.

Mr. Messner: Thank you, Your Honor.

The Court: Bring in the Jury.

Mr. Messner: Before you bring in the Jurors, Your Honor, may I—I anticipated that this would be our defense in the action and if that is the case, this witness could be excused. I have no particular purpose in calling another witness that I had in mind. As a matter of fact, I have no other witness until my doctor at 2:00 o'clock. I haven't anticipated Your Honor's ruling.

The Court: All right. If you have no further witness I will suspend until 2:00 o'clock.

Mr. Messner: Thank you, Your Honor.

Mr. Nichols: Any chance of getting, Your Honor, the doctor here at 11:00 o'clock?

Mr. Messner: I tried but—

The Court: This doctor situation is a very bad

(Testimony of William J. Welch.)

one. It is creeping into all of our courts. I don't see any reason why a doctor should be of any more importance than twelve members on this jury, or the Court, or Counsel. These doctors are well compensated for coming in here to testify and why they should be granted any special privileges or immunities is beyond my capacity to understand. I am not critical of you, Mr. Messner, in this regard; you couldn't anticipate it, of course. [107]

Mr. Messner: I think I should like to pursue with this witness and make my record, as I shan't call any other witness.

Mr. Nichols: I wonder if we could do this, if it meets with the approval of the Court, try to get ahold of the doctor in Oakland, and if he could be here at 1:00 o'clock, we might be able to complete this case today.

The Court: If you can get him, I will be available.

Mr. Nichols: Then, we can probably complete the case today.

The Court: We will take a recess until 10:30.

(Short recess.)

Whereupon the Jury returned to the Courtroom, after which the following proceedings were had in the presence of the Jury.)

Mr. Messner: If the Court please, one of the photographs yesterday was—I thought I had put it in evidence. I had not. Mr. Nichols is agreeable.

The Court: Let it be received.

(Whereupon photograph referred to above

(Testimony of William J. Welch.)

was marked Defendant's Exhibit "C" in evidence.)

Mr. Messner: The daily work record of Mr. Blazin from January, 1952, through August 15, 1953, I would like to offer in evidence. Do you have any objection?

Mr. Nichols: No objection to that. [108]

Mr. Messner: Would that be marked next in order?

The Court: It may.

(Whereupon record referred to and more particularly described above was marked Defendant's Exhibit "H" in evidence.)

Mr. Nichols: The X's over to the right hand side show the day off and where there is a reason given, the reason is correct, is that right?

Mr. Messner: That is correct.

May I have the Reporter read back the last question before the recess?

(Question read by the Reporter.)

Mr. Nichols: Object as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Mr. Messner: Q. Mr. Welch, was the Charlottesville taken out of service and place on Track 34 in the West Oakland Yard for repairs in September of 1953, 1952?

Mr. Nichols: That calls for an opinion and conclusion, object to it on that ground.

The Court: If he knows, let him answer.

The Witness: I didn't hear that.

(Testimony of William J. Welch.)

Mr. Messner: Q. Do you know the answer?

A. The car was ordered over to 34 Track during the September of 1952. [109]

Mr. Nichols: Ask that the answer be stricken. He asked whether the car was taken out of service.

The Court: Motion granted.

You are instructed to disregard the answer.

Rephrase the question, please.

Mr. Messner: Q. Mr. Welch, was the car, Charlottesville, put on Track 34 during the month of September, 1952?

Mr. Nichols: If the Court please, that is incompetent, irrelevant, and immaterial, admitted that the car was on Track 34.

Mr. Messner: It is preliminary, Your Honor.

The Court: Overruled.

The Witness: The car was ordered onto Track 34 during September of '52.

Mr. Messner: Q. Was repair work performed on that car while it was on that track?

A. Yes, it was.

Q. And was the car on Track 34 between, say, the dates of September 1st and September 15th, 1952?

Mr. Nichols: I am going to object to that on the ground that it calls for the opinion and conclusion. It would be in the record, if the Court please, to show that, that the Southern Pacific would be the people that placed it there.

The Court: Q. Were you there every day during that period? [110]

(Testimony of William J. Welch.)

The Witness: A. Outside of regular relief days.

The Court: Q. Did you have occasion to observe that particular car?

The Witness: A. That, I can't recall definitely. Although, during the regular routine I usually make an inspection of the cars in various parts of—

The Court: Q. Do you recall making an inspection of that particular car?

The Witness: A. Not definitely, no, sir.

The Court: Q. I mean as to whether it was on that particular track. I don't constantly but you observed whether or not it was there during the period that Mr. Messner has mentioned?

The Witness: A. That I don't recall, sir.

Mr. Messner: Q. Mr. Welch, as foreman do you have charge of the records concerning the cars, that is pullman cars, that are on the various tracks in the Passenger Yard? A. Yes, we do.

Q. And at my request did you check your records to determine what track the car, Charlottesville, was on and when it was there?

A. Yes, I checked records for the entire month of September.

Q. Did your records indicate whether or not the car Charlottesville was on Track No. 34?

Mr. Nichols: Object to that question on the grounds that the record would be the best evidence.

The Court: Do you have the records, Mr. Messner?

(Testimony of William J. Welch.)

Mr. Messner: (To the witness) You have the records.

The Witness: I believe Mr. Caldwell has them.

Mr. Messner: May I approach the witness, Your Honor?

(Records handed to witness.)

Mr. Messner: Now, if the Court please, I can offer the records in evidence. Mr. Welch has reviewed them. It would save time having him testify. They are Pullman records and rather difficult for other people to figure them out.

The Court: Q. Do you identify those as the passenger cars on the particular track during the period of time in question?

The Witness: A. Yes, sir.

The Court: It will save time by admitting them in evidence if you have no objection.

Mr. Nichols: I didn't hear what Your Honor said.

The Court: I said, in the interest of time, we might admit them into evidence for such purposes they may serve, without having the witness testify.

Mr. Nichols: If there is any objectionable matter, we may point it out and the Court will later rule on it?

The Court: Yes, that is fine.

Mr. Messner: Q. These are the records for September, 1952? A. Yes, sir. [112]

Q. May these be marked defendant's next in order?

The Court: May be received.

(Testimony of William J. Welch.)

(Whereupon records referred to and more particularly described above were marked Defendant's Exhibit "I" in evidence.)

Mr. Messner: Q. Referring to your records, Mr. Welch, which are marked Defendant's "I" in evidence, does your record indicate the location of the car Charlottesville, in West Oakland Yard on September 2nd?

A. Yes, sir, it showed on September 2nd that car Charlottesville was on Track 34.

Q. Track No. 34. Does the record indicate where the car was on September 3rd?

A. September 3rd?

Q. Yes.

A. The car Charlottesville was on Track 34.

Q. And on September 4th, where was the car?

A. The car was on the same track, Track 34.

Q. Now, have you—I may shorten this if I may.

Mr. Nichols: Certainly, go ahead.

Mr. Messner: Q. Have you heretofore checked through that record to show what particular track that car was on, up to and including September 15th?

A. Yes, sir, I have. It remained on Track 34 during that entire period. [113]

Q. I see. Now, during that period of time, you have heretofore testified that you do certain work on that car, do you not? Do you know the nature of that work?

A. We have also what we classify as the inspection report which listed the amount and types of

(Testimony of William J. Welch.)

work which we did on the car which was of in the nature of repainting, repairing, upholstery work, repairing electrical work, and repairs to certain mechanical features.

Q. I see.

Mr. Nichols: May I see that record, Mr. Welch.

Mr. Messner: Q. Now, on September 15th, on September 16, Defendant's Exhibit I in evidence which you have there, does that indicate that the car Charlottesville was still on Track 34?

A. No, sir. On the morning of September 16 our records indicate that the car Charlottesville was on Track 20.

Q. Track No. 20. And is that Track No. 20 the track that is used for the maintenance and repair of cars?

Mr. Nichols: Just a moment. I object to that as being incompetent, irrelevant and immaterial, what the track is used for.

The Court: Overrule the objection.

The Witness: Track 20 is used for making heavy repairs.

Mr. Messner: Q. Now, is Track No. 20 used exclusively by the Pullman Company for repairs or some other company, does some other company use them? [114]

A. No, the Southern Pacific Company does the majority of work on Track 20. They order the cars there for their heavy repair work.

Q. Well, does the Southern Pacific have some

(Testimony of William J. Welch.)

responsibility in connection with repairs to Pullman cars?

Mr. Nichols: Just a moment. I object; it is incompetent, irrelevant, and immaterial.

The Court: Objection sustained.

• Mr. Messner: Q. Does your company repair the running gear on the Pullman cars?

A. No, sir. The running gear—

Mr. Nichols: Well, if the Court please, I will object to that question as immaterial and incompetent. Duty upon the company to provide a safe car doesn't mean necessarily repairs and running gear, I don't think. Wasn't any portion of the car that was involved in the accident.

The Court: Objection sustained.

Mr. Messner: Q. Does your company have the duty of repairing and replacing grabirons?

A. Yes, sir.

Q. Now, from the records that have been admitted in evidence, tell me whether or not the car Charlottesville was returned to service at some date following September 15?

Mr. Nichols: I will object to that as being incompetent, irrelevant, and immaterial, if the Court please. [115]

The Court: Well, I assume it was—I assume that it wasn't turned into a dining car or something to rest on some roadside. Overruled.

The Witness: The record hasn't been submitted in evidence. The papers which Mr. Nichols has there

(Testimony of William J. Welch.)

indicate that the car went out in service on October 5.

Mr. Messner: On October 5, 1952?

A. Yes, sir.

Q. Now, while your men are performing repairs on Track No. 34, do you have any way of locking or protecting that track so that other cars will not come in?

A. Yes, sir. When our employees work on those tracks, they apply a portable derail at each end of the track.

Q. And if that is to be removed, is it to be removed by one of your employees or someone else?

A. Removed by the employees that apply it. No other person is allowed to remove one.

Mr. Messner: I think that is all, Your Honor.

Cross Examination

Mr. Nichols: Q. Mr. Welch, do you mean that if they were doing work on cars on any of those tracks, you would have a derail in there in order to safeguard the men from working, isn't that what you mean?

A. Yes, sir. [116]

Q. And when the derail is gone and order is given to move those cars elsewhere, why, the derail is removed, provided no one is working there, isn't that right?

A. Yes, sir.

Q. Now, the work that was done on "34", what you call refurbishing, that is, you go through and do the upholstery and light painting, that is done on the track?

(Testimony of William J. Welch.)

A. Yes, doing a minor shopping of those cars.

Q. Involved upholstery and painting, that sort of thing? A. Yes.

Q. Your work on your cars, is any substantial work that is done over in Richmond Yard?

A. Long periodical overhauls, yes, sir.

Q. On that Track 34, during the time it was there, there was a string of cars, some thirty, forty cars in there?

A. Other cars besides Charlottesville, yes, sir.

Q. In other words, there were cars that were actually connected one to the other?

A. Yes, sir.

Q. And when a car, when they say a car is out of service, what they mean is that it is not being run on the record?

A. Yes, sir. We hold it from being used in service until we have repairs completed.

Q. For example, cars are out of service when gone down the yard and restocked with linen, during the time that is being [117] done?

A. Well, yes. That wasn't our exact designation of being out of service.

Q. But when the car or a car is shipped into the S. P. Yard it may still be termed out of service, so far as the company is concerned, but still be moved from track to track, isn't that right?

A. Yes, sir.

Q. And in the event that a car is not supposed to be moved, special orders are given to the train crews, isn't that right? A. Yes, sir.

(Testimony of William J. Welch.)

Q. And if the car has a defect on it, one that comes under the Safety Appliance Act and is known, there should be a sign "Bad Order" on it, isn't that right?

A. Yes, sir.

Mr. Nichols: That is all.

Redirect Examination

Mr. Messner: Q. Mr. Welch, was it the custom and practice of the Pullman Company to place "Bad Car" tags on cars on Track 34 prior to September 15th, 1952?

Mr. Nichols: I will object to that on the grounds—incompetent, irrelevant, immaterial, if the Court please.

The Court: Objection sustained.

Mr. Messner: Q. If the Court please, I think Mr. Nichols [118] went into it on a current basis and I think it is important to know what was done in 1952 and what may be done now.

The Court: The Court has ruled.

Mr. Messner: Q. Mr. Welch, do you know whether or not there was a "Bad Order" tag on the Charlottesville September 15, 1952?

A. There is no "Bad Order" tag on the car to my knowledge or is there any record of being one.

Q. I believe that Mr. Nichols asked you something about cars being supplied with linens. Cars that are in use on trains, West Oakland Yard trains, such as come in and go out every day, those cars ordinarily find their way in Track 34 on a daily basis when they come in and out?

(Testimony of William J. Welch.)

A. No, sir. They are lined up, kept in the train, as a unit.

Q. Not broken up then, I take it?

A. Not as an ordinary practice, no, sir.

Q. Cars like the car Charlottesville that was in this repair area in the yard sometime in the early part of September until October 5 of 1952, would it be your custom and practice to supply it with linens on Track No. 34 before you sent it out on October 5, 1952?

A. Cars such as the Charlottesville car that was receiving that heavy work, would ordinarily be stripped of all supplies and linen when we start to work on it and would not again be [119] supplied until such a time as we were through with our work. Then it would be supplied in the regular service and with the regular service.

Q. It would be supplied on Track 34 or whatever track it happened to be on?

A. Whatever track it happened to be on.

Mr. Messner: Thank you very much.

The Court: That is all.

Mr. Nichols: I have no further questions.

The Court: You may be excused.

Mr. Messner: If the Court please, I should like to recall Mr. Blazin for a few questions.

The Court: Take the stand, Mr. Blazin.

JOHN BLAZIN

the plaintiff herein, recalled as a witness on his own behalf, having been previously sworn, resumed the stand and testified further as follows:

Recross Examination

Mr. Messner: Q. Mr. Blazin, working as a switchman in West Oakland, the West Oakland Yard, are you normally assigned to five days a week? A. We have been, yes.

The Court: I didn't hear you.

The Witness: It's in our agreement. [120]

Mr. Messner: Q. The contract between your organization and the Company, you are to work five days a week, is that right?

A. That's right.

Q. And what was in that agreement in 1952?

A. I don't recall if it was in effect then, I believe it was, though, if I am not mistaken.

Q. I see. Do you recall whether or not you took a vacation in November of 1952?

A. I was assigned a vacation the year before for November of 1952.

Q. And in November 1952, you got your vacation and your vacation pay; is that correct, sir?

A. Yes; although, at that particular time vacations were cancelled and I'd been working—I would have been required to work.

Mr. Nichols: Q. That means you would have gotten vacation pay, but would have had to work?

A. I would have had to work and be compensated for working also.

(Testimony of John Blazin.)

Mr. Messner: Q. Is that because there was a shortage of men?

A. I think so at that time.

Q. That shortage of men continued into 1953?

A. I believe it was in, that is, the beginning of 1953 they [121] again opened up vacations. I don't know just when they were cancelled in 1953.

Q. Well, again in November of 1953, when you were out because of an accident, did you take a vacation and get your vacation pay?

A. I got the vacation, it was assigned to me.

Q. Now, in connection with the hernia that we have talked in this case, I believe on or about September 1, 1953, you gave a history of—hospital records of having had a coughing spell or something the day before and then you felt this bulging in your groin, is that correct, sir?

A. I made a statement to the S. P. Hospital, I think. It was at the end of September of 1953 where I complained of a pain and was examined by the doctor, but no hernia was found.

Q. That was in September of 1953?

A. In the latter part.

Q. I see. After the switch incident?

A. Sometime after that, yes.

Q. I see. And then it was again called to your attention in December of 1953, either the last part of November or the first part of December, is that correct, sir, when you had a coughing spell?

A. That is right, sir.

Q. And a few days later, you were operated on

(Testimony of John Blazin.)

for that? A. That is right. [122]

Q. After that operation you remained off work, did you not, until, well, for the entire month of December, and January—December, '53 and January 1954; is that right, sir?

A. Yes, sir. I was off prior—up until February 1 of 1953.

Q. After the hernia operation, you remained off work for two months; is that right, sir?

A. Yes, sir.

Mr. Messner: No further questions.

Further Redirect Examination

Mr. Nichols: Q. You were off, actually, off, when you had a hernia operation, isn't that correct?

A. I was off, injured at that time. I had no release to go to work.

Q. Now, so far as your days of work were concerned, you say there was a five-day week. Were you actually working six days a week during January in '52?

A. In January of '52 and during almost—where there was more business on the Southern Pacific, I work the extra board, which would allow us to work 16 hours a day or whatever our seniority would allow us, which would be more than the eight hours a day, five days a week.

Q. Well, for example, here in January—. May I show this to the witness, this exhibit? [123]

This exhibit would show you worked five days

(Testimony of John Blazin.)

during that month and you had one, two, three, four, five, six, six days off?

A. That is right.

Q. Well, they didn't come on Sundays, but that would be the six days out of the month?

A. That is right.

Q. And then in February, it would appear that you worked the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, nine days straight, and then it is marked here, "Laid off for personal reasons." And on the 11th, 12th, 13th and 14th, up to the 19th, you worked right along steadily, is that right? A. That is right.

Q. Let me ask you, Mr. Blazin, with regard to the car that—suppose a car has a defect at the time this accident happened. Was there a rule that required the car to be marked plainly "bad order" car?

Mr. Messner: If the Court please, I think this car was in the custody of the Pullman Company, and if he—he does not know their custom and practice and therefore it would not be proper.

The Court: Objection sustained.

Mr. Nichols: Q. Well, the car that you were sent down to pull that day, were any of them marked "bad order"? [124]

A. There were cars that were marked "bad order."

Q. Was the car Charlottesville marked "bad order"? A. No, sir.

Q. What is your instruction when you see a car

(Testimony of John Blazin.)

that you are ordered to move that does not have any "bad order" sign on it?

A. We are not required to inspect the cars if they have no "bad order" signs. It is taken for granted that the car is all right to work with.

Mr. Nichols: That is all.

Mr. Messner: No further questions.

The Court: You may be excused.

Mr. Messner: I have no other witness, at this time, Your Honor.

The Court: Ladies and gentlemen, Mr. Messner advises me that his doctor who will testify on behalf of the defendant company is engaged in some sort of an operation and can't be here until two o'clock.

I have always been at a loss to understand why doctors' time should be more valuable than anyone elses, but, nevertheless, we are faced with that situation, and I don't want to have you interpret that as being critical of Mr. Messner, so of necessity I will have to excuse you until two o'clock in the afternoon.

You are instructed not to discuss the case amongst [125] yourselves or anyone else; not to form nor express any opinion about it until it is submitted to you at two o'clock this afternoon.

(Whereupon an adjournment was taken in the above-entitled matter until the hour of 2:00 o'clock p.m. this date.) [125-A]

Mr. Messner: Doctor Sheppard.

WILLIAM B. SHEPPARD

called as a witness on behalf of the Defendant, being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

The Clerk: Will you please state your name for the record?

The Witness: William B. Sheppard.

Direct Examination

Mr. Messner: Q. Are you a duly licensed and practicing physician in the State of California?

A. Yes.

Q. And when were you so licensed?

A. I was licensed to practice medicine in 1935; in California, in 1948.

Q. Would you give us some idea of your schooling and training, Doctor?

A. Yes, I received a Bachelor of Arts at Washington Lee University in 1931 and then Doctor of Medicine at Johns Hopkins University School of Medicine in Baltimore, 1935. I interned at Johns Hopkins Hospital during the following year and then was resident in pathology at the Henry Ford Hospital in Detroit. Then had three years of orthopedic surgery at the same hospital, [126] and in 1940 I received a Master and Surgery at the University of Michigan. I then spent a year as resident and assistant medical director at the Alfred R. DuPont Institute in Wilmington, and then obtained a fellowship in orthopedics at the New York Orthopedic Hospital and Dispensary. I then spent four

(Testimony of William B. Sheppard.)

years in the Navy, and the last year I was in charge of orthopedics at the Naval Hospital in Pensacola. After the war I was on the staff at Tulaine University School of Medicine in New Orleans, and the Oxford Clinic at New Orleans, and I practiced there for three years before coming to California in December, '48.

Q. And do you limit your practice to any particular field of medicine, Doctor?

A. Orthopedic Surgery.

Q. Orthopedic Surgery. And what is that specialty, Doctor? What does that consist of?

A. It's anything to do with the locomotion of the individual, the bones and joints, backs, necks.

Q. And your office is in Oakland? A. Yes.

Q. And are you on the staff of any of the hospitals in the East Bay?

A. Yes, I am on the staff at Providence Hospital, Peralta, Merritt, Children's Hospital of the East Bay, and in Berkeley, I am on the staff at Herrick Hospital. [127]

Q. And did you at my request examine Mr. John Blazin? A. Yes.

Q. And when was that examination, Doctor?

A. August the 10th, 1954.

Q. And that examination was performed at your office, was it not? A. Yes.

Q. Now, did Mr. Blazin give you the history of an injury on September 15th, 1952?

A. Yes, he did.

Q. I think all of us here are quite familiar with

(Testimony of William B. Sheppard.)

the history that was given, Doctor, so without repeating it in detail, he advised you that a grab-iron was missing on a car and that he swung around and was struck in the back by the next car?

A. Yes.

Q. Is that substantially the history he gave you?

A. That was the history of how he was hurt, yes.

Q. Now, did he also give you a history of another incident or accident on September 22nd, 1953?

A. Yes.

Q. Now, your examination was after both of these incidents, was it not, Doctor?

A. That's right.

Q. Was there anything else significant, Doctor, in the history of this man as he related it to you prior to the accident of [128] September 15, 1952?

A. In the past history?

Q. That's right.

A. No, he had had an injury to the right shoulder in 1947, and in 1948 he said he had fallen between two boxcars and twisted and skinned the right ankle. In October, '52, he had had a swelling, but that was subsequent to the accident.

Q. I see. Well, there was nothing other than what you have told us that was significant in what the man related to you?

A. That's right.

Q. Did you perform a complete physical examination on this patient?

A. Yes.

Q. Did you cause X-rays to be taken?

A. Yes.

(Testimony of William B. Sheppard.)

Q. Was there anything significant in the X-rays, did you find anything wrong there?

A. No.

Q. You examined the man's chest and his abdomen, did you not, Doctor? A. Yes, I did.

Q. Did you find anything significant in that portion of your examination?

A. No, he had an old healed scar in the right lower part of the abdomen, from an appendix operation, I suppose. It was [129] a McBurney type of scar. I believe it was from an appendectomy.

Q. I see.

A. Also he had a scar in the groin, where an inguinal hernia had been repaired.

Q. All right. Now did you examine his cervical spine, Doctor? A. Yes.

Q. Well, Doctor, now, the cervical spine, what portion of the anatomy is that? Is that something up in here (indicating)?

A. That's the spine between the head and the chest.

Q. I see. A. And neck.

Q. What we laymen call the neck, then, is that right? A. Yes.

Q. Now, what did you find when you examined that portion of Mr. Blazin?

A. There was nothing remarkable one could see. He had a satisfactory range of motion and it was equally well performed in bending and turning and flexion and extension. But he complained of a mild tenderness in the muscles on either side of the neck,

(Testimony of William B. Sheppard.)

and of the base of the head, and in the trapezius muscle. That's the big muscle that goes over the shoulder. And with movements he complained that he had a stretching discomfort, at the extremes of the motion.

Q. I see. Well, now, Doctor, did you find anything in your [130] examination that would be the basis for these complaints of Mr. Blazin, in that part of his anatomy?

A. No, there was nothing I could see.

Q. Was there any muscle spasm?

A. No, not at the time I examined him, no.

Q. Were there any nerve changes that might indicate disability in that area?

A. No, I went over his reflexes and sensory perception and I found nothing there.

Q. I see. Now, Doctor, did you examine that portion of his back known as the thoracic and lumbar spines?

A. Yes, I did.

Q. What portion of the back is that, Doctor? Is that the portion from the neck on down to the end of the rib cage; wouldn't that be the thoracic spine?

A. Yes, the thoracic spine is that part of the spine that has the ribs attached, and the lumbar spine is between the thoracic and the spine of the pelvis.

Q. Now, did your X-ray examination cover that portion?

A. Yes.

Q. And was there anything significant in those X-rays?

(Testimony of William B. Sheppard.)

A. No, there was no evidence of any injury that I found.

Q. All right. Did you find anything of significance in that area, Doctor? Anything wrong?

A. His posture is not too good. He had considerable lumbar [131] lordosis; that is a sway-back in the low back. The range of motion was very good. He could reach to within three inches of the floor with his knees straight, but with all of the movements he again complains that he felt as though the muscles were being stretched when they were placed under tension. And with palpation, that is, feeling the back, he complained of tenderness over the upper three thoracic vertebrae. That is just below the neck. And in the muscles on either side of the spine between the shoulder blades.

Q. Well now, Doctor, did you find—or did you perform a neurological examination as it might relate to this area of the back?

A. Yes, I went over his sensory perception and inspected the muscles for any twitching or atrophy and I did the reflexes and abdomen and the scrotal and lower extremities, as well as the upper extremities.

Q. Well, is there anything about your neurological examination as it related to the thoracic and lumbar spines that indicated any disability to you?

A. No.

Q. Now, did you find any muscle spasm in that area?

A. No.

(Testimony of William B. Sheppard.)

Q. Did you examine Mr. Blazin's upper extremities? A. Yes.

Q. By that I mean, Doctor, his shoulders and arms and so forth? [132] A. Yes, I did.

Q. Did you find anything of significance in that area?

A. No, and I would like to mention, though, I did find in the neurological some relative diminution of sensation of the entire hands on both sides, what I would call a glove type of hypesthesia. It's usually on a functional basis, because it follows no physiological pattern.

Q. Now, Doctor, what do you mean by a functional basis?

A. One that is not due to any organic injury to the nerves, but is often associated with nervousness or apprehension or——

Q. I see. It is a real thing, though, is it not, Doctor?

A. No, not necessarily. It is not real, because often it will pass right away. For instance, some people will feel when they are excited, going on the stage or something of the sort, have to make a speech, their hands might get numb and tingle and then it will go away.

Q. All right, Doctor. Did you perform any tests or anything of that kind?

A. Yes, I checked his grip in both hands. The patient was right-handed and his grip was a little stronger on the right than on the left. Didn't seem

(Testimony of William B. Sheppard.)

to be particularly strong in his grip, although he seemed to be a fairly robust fellow.

Q. I see. Was the difference between the two hands—did you find that to be within normal——

A. Within normal, yes. [133]

Q. Within normal limits. Now were there any particular complaints that Mr. Blazin made relative to the upper extremities, the arms and shoulders and so forth, that you haven't told us about?

A. I don't believe so. Let me check on that.

Yes, he said that sometimes he felt a tingling on all the fingers of his hands.

Q. I see.

A. That would disappear with rest. It would come and go.

Q. I see. Was that consistent with your findings of this hypesthesia, whatever—I think you called hypesthesia?

Q. Yes. Hypesthesia means a relative dullness. You check with the sharp point and with light touch and it felt a little duller along the hands, the pattern of a glove around the hands (indicating).

Q. Now, did you examine Mr. Blazin's lower extremities? A. Yes, I did.

Q. Well, did you find anything of significance in that portion of your examination?

A. No, there was nothing of significance. There were two small scars on the top of his left foot, which he said was due to an old acid burn. I had him make a full squat, which he was able to do

(Testimony of William B. Sheppard.)

very well, and with that he said he had some discomfort in the mid-part of his back.

Q. Did you cause to be performed or perform any laboratory [134] studies in connection with him?

A. Yes, I did. I had a number of studies made to see whether or not he had any infection or any anemia, any other—he had told me about an infection that he had had where the glands were swollen, and he had had a high fever, and I wanted to see whether or not he had anything like undulant fever or brucellosis, which will often give you some vague muscle discomfort. All the tests were negative.

Q. Well then, there was nothing of significance in the laboratory findings?

A. Nothing significant.

Q. And, now, based upon your entire examination and the history given you, did you arrive at a conclusion and opinion in connection with this—

A. Yes, including the history and the course of events and my examination and the complaints which he had at the time I examined him, the type of injury he described, where he said the car had hit his entire back and with a delay in significant symptoms,—I think he worked a couple of days afterward, and then he was told that he had a bruise on his back and that fitted with the history that he gave me. I felt that he bruised the back and that apparently his complaints at the time of my examination was only with the extremes of motions that

(Testimony of William B. Sheppard.)

I asked him to do, that he said that there was a sensation that the muscles were being stretched. So I felt that he had been [135] bruised, there had been bruises in the muscles, which had, he still felt when he stretched them to the extremes.

Q. I see. Now, did Mr. Blazin tell you that following the incident of September 15, 1952, some two months later, he had returned to work? Did he give you that history? A. Yes.

Q. Did he tell you that he had thereafter worked for ten months?

A. Yes, he said worked off and on and then in September of '53 he had had a—pulled a switch and felt some pain in his back again, and then that was in the lower portion of the back, but apparently he didn't have too much persistent trouble in that region, and then he was admitted to the hospital, I think it was in December, '53, and during that time he had a hernia repair, and it was either in October of '52 or '52 that he had this swelling of the glands and a high fever for a while.

Q. I see. Well now, Doctor, was Mr. Blazin working at the time you performed this examination?

A. Yes, he said he had been working since February the 1st, 1954, and that he hadn't lost much time since then.

Q. What would be your conclusion, Doctor, as to the ability of this man to continue working as a switchman, bearing in mind the history that he gave you, your examination and all of these various

(Testimony of William B. Sheppard.)

events that you now know about? Do you think [136] that that man should be able to continue working? A. Yes.

Q. Now in connection with the complaints of pain on extreme motion, is there any recognized medical treatment that might be beneficial for one who has that type of complaint?

A. Well, I certainly feel that there is, because I try to explain to all my patients that after any bruising or any inactivity, there's going to be a shortening of the muscles and a tightness, and whenever they are stretched, they are going to hurt. And, of course, the sooner you start to stretch them out, the better off you are and the easier it is. But—and I feel that you have got to persist in your efforts, even in spite of some discomfort, to regain the suppleness of those, because if you don't, any time you reach the limit of what you have been accustomed to, you are going to feel discomfort. The older you are, the more difficult it is. Mr. Blazin, now, is twenty-eight, and I feel that if he would—it's not going to be an exercising once a day, and resting for twenty-four hours, and then—or if you are sore, resting two or three days. But it's a matter of insistent and gradual increase in your range of activities that's going to get him back to where he can do his customary stretching without discomfort.

Q. Well, you feel that if Mr. Blazin follows such a routine, he would get rid of these complaints that he has? [137]

(Testimony of William B. Sheppard.)

A. Yes, all of us know that we don't try to touch the floor for a long time, we can't, and if somebody insisted that we do it all at one time, we would be sore. But if we gradually did it, I think that most of us can.

Mr. Messner: I see. Pardon me just a moment.

Mr. Nichols: Counsel, perhaps we can look at the report while we are waiting.

Mr. Messner: Surely.

No further questions.

Cross Examination

Mr. Nichols: Q. Doctor, you make a number of these examinations for the Southern Pacific, do you not? A. Yes.

Q. And likewise for other agencies and companies that are involved with employees?

A. Yes.

Q. Do I understand you correctly that you think this man may not have been getting the proper treatment? A. No.

Q. Well, he gave you a history, did he not, of having gone to the Southern Pacific Hospital for innumerable times? A. Yes.

Q. Now there isn't any doubt in your mind that the man still has and is still suffering from some of the effects of this [138] injury, isn't that correct, Doctor?

A. Well, I think that the stretching that he complained of, that's all he complained of at the time I examined him and asked him, and had him

(Testimony of William B. Sheppard.)

go through these motions, was probably secondary to the bruise and the inactivity that he had had.

Q. Well, Doctor, you passed this word off, "bruising". Actually don't you believe that there was some tearing to the muscular structure in that man's body?

A. Well, of course, I wouldn't know, but according to the description he gave me of the accident, I don't know why there would be.

Q. Well, let's take the ordinary bruising that you are referring to. You would get a blow and an increased amount of blood in the area and the blood would soon be absorbed and a man should be free of pain, shouldn't he?

A. The blood is sometimes slowly absorbed, and then there is—there's always soreness after a bruise. It may persist for an indefinite period of time. There again, the best result is early exercise and trying to disperse any bruising, get it absorbed.

Q. Did you get a history from this man that he is looking at a signal man and he reaches with one hand and grabs the place where a grabiron is supposed to be and it is there?

A. Yes.

Q. Draws himself up and puts his hand on the next place and [139] there's no grabiron, so he swings off and is dragged along with his arms stretched, and he hits the back of the car? Isn't that the history you got from?

A. Yes, but the emphasis, when he told me, was on the blow from the back. [140-A]

Q. Didn't he tell you from the time he dropped

(Testimony of William B. Sheppard.)

it happened so quick he was stunned and didn't know what happened?

A. Well, he told me pretty much in detail how the car was standing still and he got on the step and put his left hand on the left hand hold and reached for the right. And as the cars began to move and the right hand hold was missing, his foot came off the vestibule steps and he went down about eighteen inches. He was still holding on, so, he got between the cars and this second pullman hit him on the back from the head straight down. That is the way he said it. Then it knocked him forward and he stumbled over to the ground.

Q. Are you just assuming that all the man got was a bruise in the back?

A. Well, I was——

Q. Well, the reason I asked you, I want you to call a spade a spade here. We are trying to find out what happened to this man. Are you assuming that all that happened to him was that he got a bruise in the back?

A. No. I think that in the process of all that he may have strained the muscles, too.

Q. Well, you say that this stretching that he has, that he should have. Aren't you saying that in your opinion you think there is some scar tissue that formed in there and that has caused the muscles to contract? Isn't that what you would expect to find if you cut that man open and looked? [142]

A. I doubt it. I doubt if you would be able to see it if you cut him open. I don't think that would

(Testimony of William B. Sheppard.)

be necessary. But I don't think you would be able to detect the scarring. I think that often the muscles will consist of numerous little fibers and then when they have been bruised and overstretched, they tend to contract and they might have some sticking together.

Q. Well, when you say overstretched, you mean torn, don't you?

A. Not necessarily. They are elastic.

Q. Well, when you tear a muscle or pull a muscle beyond its proper, the proper length of doing so, or overextend it, the muscle and small fibers begin to break, don't they?

A. They may, within limits. Yes, I have seen ruptured muscles. You usually know very definitely they are ruptured when ruptured.

Q. Well, Doctor, you were referring on direct examination to some of your own patients. Now, you had a Mrs. Chapman and a Mrs. Martin that worked for the telephone company. Do you remember those women? A. I certainly do.

Q. You had them for over two years and all they had was a stretching of the muscles in the back; isn't that right?

A. That is a simple explanation.

Q. Well, it just happens to be that those two ladies were [143] clients of mine. I remember that. I remember you even put them in a cast.

A. Put one of them in; I don't remember about the other one.

Q. Well, now, those two ladies were sitting in

(Testimony of William B. Sheppard.)

an automobile that had cushions in their backs, weren't they, when the car was bumped?

A. Yes, they apparently—they were thrown off on the floor. And one had pneumonia at the time.

Q. Well, I am not talking about pneumonia.

Well, now, isn't that true that from your studies and from your learning, when you get a person with a back such as this man complained about and with the history that you gave to him, if he came to you and wasn't employed by the Southern Pacific Company, and he came to you for treatment, wouldn't you say, "Well, Mr. Blazin, you have had some scar tissue that has formed down your back. How expensive that is will be the thing that will determine how well I am going to be able to get you"?

A. I don't think I would tell Mr. Blazin that he had scar tissue in his back. My patient—and I told those two women that they needed to stretch those muscles out and that they still needed more exercise.

Q. Why would you want to stretch the muscles out?

A. To get them back to suppleness.

Q. What is holding it back? [144]

A. Well, now, that is the point. You have to—many of my patients I have to lead them by the hand.

Q. Well, Doctor, please, I don't—I want to talk about this man because this is the place we are going to do it.

A. Well, I thought you were bringing up the——

(Testimony of William B. Sheppard.)

Q. You wouldn't tell Mr. Blazin that he had scar tissue? A. No.

Q. Now, Mr. Blazin told you he went back to work with a back that ached and a neck that ached, didn't he? A. Yes.

Q. And he went back to work because he wanted to keep his job?

A. I didn't—I assume he did.

Q. And that he could do things standing up, that didn't bother him so much, but when he had to bend over, and when he had to lift anything, he had difficulty with his back. He told you that didn't he? A. Yes.

Q. Now, that didn't indicate to you that he was the type of patient that you had to walk around and lead by the hand, did it?

A. That isn't what I meant. I meant that when anybody feels discomfort—we feel that we are injuring ourselves; we forget that we have all been stiff at one time or other, and we have to regain the suppleness. Even youngsters that play [145] football will get sore and stiff but that doesn't mean he has to quit football.

Q. Well, now, let's get back to Mr. Blazin, again. Isn't it your opinion that there has been scar tissue that has formed within the area of that man's cervical spine and his low back?

A. There could be. I wouldn't know whether or not there has been very much but there is all degrees of scar tissue. In any of us there is bound to be scar tissue in any cut.

(Testimony of William B. Sheppard.)

Q. What is it, Doctor, then, that would cause this man's muscles to need stretching?

A. Because when you rest and don't stretch them, they become shortened.

Q. Well, isn't this what you mean, Doctor, that you take an ordinary muscle of fibers, isn't it?

A. Yes.

Q. And when you get a tearing or a partial rupture, assume that you get a tearing, that area of the tear fills in with scar tissue, isn't that what nature does to attempt to repair that torn muscle?

A. Yes.

Q. And you take a broken leg, for example, nature will fill out a callus and ultimately the two ends grow together?

A. Yes.

Q. Now, when you rupture a muscle or a ligament, nature throws out what you medical men call callus scar tissue? [146]

A. Yes.

Q. And the thing that concerns you as a doctor, where you have a man that comes in, has a disability, and you X-ray him and don't find any broken bones, the question is as to whether or not that man has any extensive amount of scar tissue in the area involved. Now, isn't that true?

A. Well, yes, that could be. There are variations in these. Sometimes you can see the scar tissue much more than other cases.

Q. Well, take for example, now, the man is injured in September of 1952. With the ordinary individual that comes in and would relate to you what had happened, you would expect him to be without

(Testimony of William B. Sheppard.)

symptoms within a matter of four or five months, wouldn't you? A. Yes.

Q. On the other hand, like the two ladies that you have, some of these people have more damage than others, isn't that right?

A. Some do, that's obvious.

Q. Take this man. You knew you were making an examination for the Southern Pacific Company, didn't you? A. Yes.

Q. Now, here on March 31, 1954, from the Southern Pacific Hospital, "Patient has recurrence, he says, of pain just under it and below the right scapula, procaine given. April 8th [147] returned, stated the shoulder felt good but still having slight occipital and headaches"—I guess. April 16th, this almost two years afterwards, "Still has aches in the cervical region with spasms of the cervical muscles". Now, that would indicate to you that there had been some substantial scarring, wouldn't it, Doctor?

A. It would indicate to me that he still had some recurrent pain there. Did they see the spasm or did they say that he was talking about a spasm?

Q. Well, let's see here. "Still has ache in cervical spine"—let's see, "associated with spasm of the cervical muscles". Well, there is a number of cases they talk about here. Here is one, "Patient much improved but yet still some spasm in the right shoulder and lower back. Patient for massage. Given by Dr. Elwell", that is March 5th.

Now, would that make any difference to you in

(Testimony of William B. Sheppard.)

your examination as to how extensive his injury was?

A. Yes. Apparently he had ben exercising and gotten more pain and spasm.

Q. Here's February 19, "Patient returned with similar complaints, physical therapy offered only temporary relief as to hot baths, at night marked muscle spasm in musculature of the right a.t. of lumbar spine." What does that mean to you as a doctor, if you picked up this chart and found that a doctor has made that finding? [148]

A. It would mean to me that he had pain in the back and muscle spasm.

Q. Well, that muscle spasm is something that is involuntary, isn't it? A. Yes.

Q. And the thing that nature permits the muscles to do, and indicates that this pain is beneath or in the immediate vicinity, isn't that right?

A. Yes.

Q. And a kind of splinting, isn't it, Doctor?

A. That is right.

Q. In other words, the muscle goes into a tension and can't be moved because that area hurts. And by making the muscle involuntarily tight sort of splits it, isn't that right?

A. Yes. And when irritated by pain or—it would be automatically—it's like a cramp in the calf. That is the best explanation. We have all had that experience.

Q. Well, wouldn't that indicate to you here, a matter almost two years after that injury, that

(Testimony of William B. Sheppard.)

there had been some rather extensive scarring in the area?

A. There again that is a difficult question to answer, but—because I felt that there was nothing that I could see in that respect, of course, he did have these complaints. Now, he mentioned during giving the diathermy. That is what I would suggest telling the individual that the diathermy is not going [149] to cure, it will give it temporary relief, but nobody can move those muscles but himself. I felt that is what was needed.

Q. A moment ago, didn't you say when he came in with a spasm in the back, that that indicated that had been moving too much?

A. If you didn't move for a month and then went out and took some exercise, it would be too much.

Q. Well, you said there was a spasm in the back, you said that indicated to you that he had been overexercising the muscles?

A. Yes. And I mentioned that the best demonstration, what we have all seen in the way of spasms, is the cramp in the calf. That is what a youngster will get when he starts playing football.

Q. Suppose you have a man that has an injury that Mr. Blazin has, and suppose he goes to the hospital, not once, but time and time again after working and says, "When I start to work in the morning, it is not bad, but after a couple of hours I get these terrible pains and my back gets tight".

(Testimony of William B. Sheppard.)

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(Testimony of William B. Sheppard.)

Wouldn't that indicate to you that there had been some substantial scarring in that man's back?

A. He told me——

Q. No, Doctor. Answer my question. I am taking this from the record. [150]

A. He didn't tell me that.

Q. I am just taking you to take what I told you, what is borne out by this record.

A. I still wouldn't call it extensive scarring. I would call it shortening of the muscles, tightness of the muscles.

Q. But what tightened it? You won't tell us?

A. What?

Q. What caused it to tighten? What caused it to get short? You won't tell us, is that the idea?

A. I have tried to.

Q. Did you review this record at all?

A. No.

Q. Suppose the people at the hospital, and I will read the record to you, on September 13 of this year, by Dr. R. M. Worth. "Patient returns, still complaining of tension in upper back and lower back which gradually increases and builds up like migraine aches, has several days—see old record, probably taken physiotherapy, heat and X-ray therapy have all been tried and were marked but without—". What is "S" with a dash over the top mean? A. Without.

Q. "——without any marked change, local procaine injections given, relief for four or five days, soreness is always present but occasionally patient,

(Testimony of William B. Sheppard.)

especially with work buildup, after several days work, relieved by resting several days. [151] Patient states the onset of this trouble to two years ago when he received a blow on his back on the job. Patient does not desire local procaine now, just some pain pills to have in reserve in case he needs them. He seems adjusted to it, the idea that the condition is chronic and plans to go to night school to learn a trade that requires less strain with the back and shoulders than a switchman. Patient is given—" and apparently this was some drugs, you can tell me what those are. A. A.P.C.

Q. What does that mean?

A. Aspirin, phenacetin, caffeine. That is like aspirin. Empirin is also the same thing.

Q. Pain killing pills. "Patient advised to return if needed. Patient encouraged to follow through with plans for night school."

Now, would your examination and history of this man, your examination and taking this as part of the history, would that lead you to believe that the man actually has some disability now?

A. I didn't deny that. However, I think that that is a little fatalistic, saying that you should accept it as chronic. And since the heat somebody put on his back only gave him temporary relief, I feel that he should be told that he—what he has to do to get rid of this. [152]

Q. What does physical therapy mean to you?

A. Somebody else exercises for you.

Q. Pulling and stretching, doesn't it?

(Testimony of William B. Sheppard.)

A. Well, of course, that will vary. It usually is heat and massage. You get that maybe at the most once a day, maybe once a week. By the time that you get back the next week, you are not better off than you were a week before.

Q. Didn't you know, Doctor, when you take three and four times a week physiotherapy—

A. That is exactly what I mean. When you have somebody move your muscles and massage you once a day for 15 minutes to a half an hour, you still have 24 hours in which to stiffen up.

Q. You said Mrs. Martin and Mrs. Chapman had physiotherapy to the tune of about \$400.

Mr. Messner: I would like—

The Court: What is your objection?

Mr. Messner: I think what happened to Mrs. Martin and this other lady is entirely immaterial in this case.

The Court: I think we have had enough of Mrs. Martin.

Mr. Nichols: Q. Well, Doctor, you refer many of your patients to physiotherapists, don't you?

A. Yes, but I always tell them that that is not the thing that will get them moving again.

Mr. Nichols: I think that is all. [153]

Mr. Messner: No questions.

The Court: You may be excused now.

Mr. Messner: Defense rests.

Mr. Nichols: Yes, Your Honor.

Are you through?

Mr. Messner: Yes.

The Court: The Jury is excused for ten minutes.

(Whereupon the Jury left the courtroom and the following proceedings were had outside the presence of the Jury.)

The Court: For the rule with respect to instructions, let the record show that the following instructions, show that the following instructions will not be given.

You may take these numbers down as I give them to you.

Plaintiff's No. 1 will not be given.

Plaintiff's 13, 14 will not be given.

If I go too fast for you gentlemen, please indicate it.

Defendant's 11, 13 will not be given.

The following instructions are rejected because they relate to the applicability of the Federal Employers Liability Act or relate to fault:

Plaintiff's 2, 7, and 8.

Defendant's 5, 9 and 10.

Now, gentlemen, are we in agreement that the issues under the Federal Employers Liability Act are no longer in this [154] case?

Mr. Nichols: Yes, Your Honor.

Mr. Messner: Yes, Your Honor.

The Court: The following instructions are covered by instructions which I have prepared, a copy of which I now hand to you both.

Instructions, copy of which I have just handed to you, cover, following submitted instructions,

cover Plaintiff's 3, 4, 5, and 6, and the Defendant's 12.

Defendant's 4 and 7 are covered by my own general instructions.

The last sentence of the Defendant's Instruction No. 3 will be given.

Defendant's 6 will be given.

Plaintiff's 9 will be given.

The following instructions are modified:

Defendant's Instruction No. 8, last sentence is deleted.

Defendant's Instruction No. 1, first sentence and the last sentence will be given. The portion in the middle of the paragraph of the instruction will be deleted.

Defendant's Instruction No. 3, just the last sentence will be given.

Defendant's No. 2, the last three lines of that instruction will be deleted.

Plaintiff's Instruction No. 10, there are certain minor [155] amendments, for example, at the end of paragraph 3 which reads "and find what he was reasonably certain to have heard and the time loss had he not been disabled. If you find that he was so disabled" and there are certain other minor corrections which will not bother you with that is a matter of course.

The Plaintiff's Instruction No. 11, the fourth line from the bottom, "Prescribes no definite measure of damages" is omitted. And the last phrase "not exceeding the amounts prayed for in the complaint" is omitted.

Plaintiff's Instruction No. 12, four lines from the bottom "mortification where they are shown to exist" is eliminated.

Plaintiff's Instruction No. 15 reads as follows: "If your verdict is in favor of the Plaintiff and against the Defendant, Defendant is liable for all damage approximately resulting therefrom", and then I have inserted "I have heretofore instructed you on approximate cause. In this connection I instruct you that if you find that the original injury".

Then I am giving the usual and customary instructions on the measure of damages and the ordinary and customary general instructions which are given in these cases.

We will take a recess for a few minutes and you may then proceed with the arguments.

(Short recess.)

(The following proceedings were had in the [156] presence of the Jury.)

The Court: Proceed. [157]

* * * * *

Instructions to the Jury

The Court: Ladies and gentlemen of the Jury, this is the time for me to give you the instructions by which you should be guided in your deliberations upon this case. At the conclusion of the instructions you will retire to your jury room to begin your deliberations.

At the time that you were impaneled at the beginning of this case, and at such times as you were dismissed, I cautioned you and admonished you not to discuss this case with anyone, including

yourselves. I instructed you not to suffer yourselves not to be approached by anyone concerning it and not to form or express any opinion about it until such time as it had been finally submitted to you, and I assume that you have strictly adhered to this admonition.

The presentation of the evidence in the case has been concluded. You have listened attentively to the arguments of [192] Counsel. I want you to listen just as attentively to me when I give you the instructions that are necessary in the case.

First, it is your exclusive province to judge the facts. The law permits a Federal judge, if he so desires, to comment upon the evidence, but you have heard all the evidence and you are just as competent as I am to judge the facts. Therefore I express no opinion about them.

It is my exclusive function to instruct you as to the applicable law, which, as I have indicated, you will, in turn, apply to the facts. I do not wish you to understand or to conclude from anything that I may have had occasion to say during the course of the trial or in the course of these instructions that I have intended directly or indirectly to indicate any opinion upon my part as to the facts or as to what I think your finding or your verdict should be, because you alone, ladies and gentlemen, must decide the facts.

In these instructions the Court in no manner or form expresses any opinion, nor does it desire to express any opinion upon the weight of the evidence or the truth or the falsity of any witness'

testimony or that any alleged fact in the case is or is not established. With the questions of fact, weight of the evidence, credit, that you should give to any witness who has been sworn in the case, the Court has nothing to do. These are matters which are entirely within your province and which you, as jurors, under oath must determine [193] for yourselves.

In these instructions which I am about to give you I caution you and admonish you not to select a single instruction alone, or a portion of any instruction alone, but to consider all the instructions in determining any issue that is before you in this case. I likewise instruct you to distinguish carefully between the facts which you have heard here on the witness stand, facts testified to by the witnesses and statements made by the attorneys in their arguments as to what facts have been proved and if there is a variance between the two you must, in arriving at your verdict, to the extent that there may be such a variance, consider only the facts testified to by the witness. And you are to remember that statements of Counsel in their arguments are not evidence in the case unless such statements are made as admissions or stipulations concerning the existence of a particular fact or facts during the trial of this case. The only legitimate purpose of argument is to aid you to assist you in arriving at a verdict that will be just and proper to both sides.

It sometimes happens during the trial of a case—I think it happened once or twice here—that ob-

jections are made to questions asked or to offers made to prove certain facts. Sometimes these objections are sustained by the Court and it sometimes happens that evidence given by a witness is stricken out by the Court upon motion. In any such cases [194] you are instructed that in arriving at a verdict you are not to consider as evidence anything which has been stricken from the record by the Court or anything offered to be proven or contained in any question to which an objection has been sustained by the Court. You are to remember, ladies and gentlemen, that you cannot find a verdict upon mere possibilities or surmises or suspicions however strong they may be. Likewise, your verdict should not be based upon the doctrine of chance, namely that it may chance to be that a fact is more likely to be true than otherwise.

Now, if the attorneys or the Court, during this trial, made any statements outside of the record, that is a statement that was not pertinent or relevant or material to the issues involved in the case, or if the Court, in discussing any objection or motion, made any statement which seemed to you in any way to reflect upon Counsel or seemed to you to indicate that the Court has some opinion upon the merit of the case or upon some fact or issue involved in the case, then I admonish you to disregard those statements, if such a statement was made, in arriving at a verdict in this case.

In civil cases, and this, of course, is a civil case, the affirmative of the issue must be proved. The affirmative here is upon the plaintiff as to all affirm-

ative allegations of the complaint. Upon the plaintiff, therefore, rests the burden of proof of allegations. You are the exclusive judges [195] of the weight and sufficiency of that evidence. Likewise, in civil cases, the preponderance of evidence is all that is required and the burden rests upon the plaintiff to prove his case by a preponderance of the evidence before he is entitled to a verdict. By a preponderance of the evidence is meant such evidence as when weighed with that opposed to it has more convincing force and from which the result that the greater probability is in favor of the party upon whom the burden rests. Preponderance of evidence means not the greater number of witnesses, but the greater weight, probability and convincing effect of the evidence and proof offered by the party holding the affirmative as compared with the opposing evidence. Where the evidence is contradictory, your decisions must be in accordance with the preponderance. Therefore it is your duty, however, if possible, to reconcile such contradictions so as to make the evidence reveal the truth. When the evidence, in your judgment, is so equally balanced in weight, quality, effect and value that the scales of proof hang even, your verdict should be against the party upon whom rests the burden of proof. You are the sole judges of the weight of evidence here and credit of the witness in determining the credibility of a witness, you should consider whether his testimony is in itself contradictory, whether it has been contradicted by other credible witnesses, whether the statements made by such wit-

ness are reasonable or unreasonable, whether they are consistent with his other statements or with the facts established by other evidence or admitted facts. You may also consider the witness' manner of testifying on examination, the character of his or her testimony, bias or prejudice, if any, manifested by the witness, his interest or absence of interest to execute his recollection, whether good or bad, clear or indistinct, concerning the facts testified to, his inclination, motives, together with the opportunity of the witness to know the facts whereof he may speak, and having thus considered all these matters, you must fix the weight and value of the testimony of each and every witness and of the testimony as a whole. You are not bound to decide this case in accordance with the testimony of any number of witnesses against a less number or against a presumption or other evidence which satisfies your minds. The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact in a civil case. Of course, if any witness examined before, ladies and gentlemen, has willfully sworn falsely as to any material matter, you may disregard his or her entire testimony. That is being convinced that a witness has stated what is untrue, not as the result of a mistake or inadvertent, but willfully and with a design to deceive, you must treat all of such witness' testimony with distrust and suspicion and you may reject it all unless you shall be convinced that the witness, in other particulars, has [197] sworn the truth. All witnesses are presumed to speak the truth. This pre-

sumption may be repelled by the manner in which he or she testified, by the character of his or her testimony, by his or her motive, or by contradictory evidence. Further, that in arriving at any verdict here, you must not permit yourselves to be influenced in the slightest degree by sympathy, prejudice, or any emotion of any kind in favor of or against either party. You must proceed solely upon the evidence introduced and the instructions of the Court. Sympathy is a very commendable quality in the human family; however, it has no place in the jury box.

The Safety Appliance Act, of which we have been speaking during the course of this trial, required under the facts of this case, that the car, the Charlottesville, be equipped with two grab-irons. The defendant company admits that the Charlottesville was not equipped with a right-hand grab-iron. The sole question you must determine in deciding whether or not the defendant is liable is this:

Did the absence of the grab-iron approximately cause or contribute to the plaintiff's injury?

If you find that it did, you must find for the plaintiff. If you find that it did not, you must find for the defendant.

Since the defendant had an absolute duty to furnish the grab-iron, you must not concern yourselves with the presence of absence of reasonable care on the part of either the [198] defendant railroad or the plaintiff. There has been some talk about the Federal Employers Liability Act. You should disregard that entirely. I repeat, the sole question you

should consider in determining whether or not the defendant is liable is the question I have previously related to you:

Did the absence of the grab-iron proximately cause or contribute to the plaintiff's injury?

Now, the proximate cause of an event must be understood to be that which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces that event, and without which that event would not have occurred. In other words, it is the efficient cause, the one that necessarily set the other cause in operation.

If you find for the defendant on this issue, your consideration of the case will have ended, and you should return with your verdict.

If you find for the plaintiff on this issue, you should then consider the question of damages, the amount of such assessment of damages.

You are not to indulge in speculation nor, as I have previously indicated, should you be swayed by sympathy or prejudice, but you must be controlled solely by the evidence and by the law. The law only permits such damages to be given in this class of cases as will be pecuniarily compensate a person for the injuries sustained by him. You want to remember [199] that each of the parties litigant here is entitled to equal and exact justice at your hands and to a fair and dispassionate consideration of the entire case. Damages in all cases, if awarded, must be reasonable.

You must also consider and determine this case as litigation between persons of equal standing in

the community. You should not be influenced or affected by the fact that a defendant is a railroad or a corporation, nor should you be in any way influenced by any thoughts or ideas that you may have as to the financial standing of any party to this litigation. Such matters have no proper place in a case of this kind.

If damages are awarded, the only which you can award is such as reasonably to compensate for the detriment suffered. There is no purpose here to inflict punishment or impose any penalty or to make an award for the sake of example.

The burden of proof as to the amount of plaintiff's damages is upon the plaintiff, just as is the burden of proof in every other affirmative allegation of plaintiff's complaint.

While it is incumbent upon the plaintiff to prove the amount of damages he has sustained by a preponderance of the evidence, as I have previously defined preponderance of the evidence to you, the law does not require of the plaintiff proof amounting to demonstration or beyond a reasonable doubt. All that is required in order for plaintiff to sustain the [200] burden of proof in respect of the amount of his damages is to produce such evidence which, when compared to that opposed to it, carries the most weight so that the greater probability is in favor of the party upon whom the burden rests.

However, you can allow nothing for elements of damage which are speculative or conjectural, and as to future detriment you can allow only for that

which the evidence shows with reasonable certainty is likely to follow. If, as to any claimed element of damage or detriment, there is such uncertainty that you cannot determine that such element exists, or that the claimed detriment is reasonably certain to result in the future, then, to the extent of such uncertainty, the plaintiff then has failed to sustain the burden of proof, such uncertainty must be resolved against the plaintiff and in favor of the defendant.

If your verdict be for the plaintiff in this case, the measure of his recovery is what is denominated as compensatory damages; that is, such sum as will fairly compensate him for the injuries he has received. The elements entering into his damages are the following:

(1) The reasonable value not exceeding the cost to said plaintiff of the services for the necessary care and attention of physicians and surgeons, hospital services and X-rays, if any there were, reasonably required and actually supplied to plaintiff in the treatment of his injuries, if any he sustained, [201] as a result of the accident in question.

(2) The reasonable value of the time lost by plaintiff since his injury wherein he has been unable to pursue his occupation. In determining this amount, you should consider evidence of his earning capacity, his earnings and the manner in which he ordinarily occupied his time before the injury and find what he was reasonably certain to have earned in the time lost, had he not been disabled, if you find that he was so disabled.

(3) Such sums also as will compensate the plaintiff reasonably for any loss of earning power occasioned by the injuries in question, and from which he is reasonably certain to suffer in the future, if you find that he suffered such loss. In fixing this amount, you may consider what the said plaintiff's health, physical ability and earning power were before the accident, and what they are now; the nature and extent of his injuries and whether or not they are reasonably certain to be permanent, or if not permanent, the extent of their duration, all to the end of determining the effect of his injury upon his future earning capacity and the present value of the loss so suffered, if any.

(4) You may consider such sums as will compensate plaintiff reasonably for any pain, discomfort and anxiety suffered by him and approximately resulting from the injury in question, if you find any, and for such pain, discomfort and anxiety, [202] if any, as he is reasonably certain to suffer in the future from the same cause.

If from the evidence in the case and under the instructions you find the issues for the plaintiff, then in order to enable you to estimate the amount of such damages as you may allow for pain and suffering, it is not necessary that any of the witnesses should have expressed an opinion as to the amount of such damages, if any; you may estimate such damages from the facts and circumstances in evidence and by considering them in connection with your own knowledge and experience in the affairs of life. With regard to pain and suffering

the law leaves such damages to be fixed by you as your discretion dictates and as under all the circumstances may be just, reasonable and proper.

While the law says that a recovery may be had for mental suffering, it means a recovery for something more than that form of mental suffering described as "physical pain". It includes the numerous forms and phases that mental suffering may take, which will vary in each case with the nervous temperament of the individual, his ability to stand shock, the nature of his injuries, whether permanent or temporary; mental worry, distress, grief, are proper component elements of that mental suffering for which the law entitles the injured party to redress in monetary damages.

If your verdict is in favor of the plaintiff and against [203] defendant, the defendant is liable for all damages proximately resulting therefrom as I have previously instructed you what constitutes proximate cause. I shall have no occasion to repeat it. In this connection I instruct you that if you find that the original injury so impairs the plaintiff's physical condition and he sustained a second injury which resulted by reason of the said weakened condition and which would not have occurred had his bodily efficiency not been so impaired, then the defendant is liable for all of the damages resulting from both the original and the subsequent injury, if any.

You are not to understand that because I have instructed you on the rule of the measure of damages that you are to give damages simply because

instructions have been addressed to you on that. These instructions related to the damages are intended to apply only in the case where the plaintiff is entitled to a verdict but they have no application on the case if liability of the defendant has not been established. Nor should they be understood by the jury as conveying any intimation that in the opinion of the Court the plaintiff is or is not entitled to damages.

I am about to conclude the instructions. Do you have any exceptions?

Mr. Nichols: No, Your Honor.

Mr. Messner: Yes, Your Honor.

The Court: You may be excused for about five minutes. [204]

(Whereupon the jurors left the courtroom and the following proceedings were had outside the presence of the Jury.)

The Court: Proceed.

Mr. Boyd: I wish to apologize for not being present this morning. Judge Harris insisted that I be present at a matter.

Now, as to the instructions,—probably due to my absence—but this new instruction which Your Honor proposed, which has no number, starting with “The Safety Appliance Act required under the facts of this case that the Charlottesville be equipped with * * * grab-irons * * *”, Your Honor, I except on the grounds that it takes from the Jury entirely the question as to whether or not this car was in use or whether it was under repair. Now, I don’t believe that the matter was taken

up by Your Honor this morning and I felt——

The Court: Well—pardon me, I didn't mean to interrupt you but I think that the Court expressed itself rather clearly on that subject this morning. In other words, I took the position that the Safety Appliance Act, first of all, applies. This is a yardman; the car was being shunted or kicked onto the track. Whether for purposes of repair or refurbishing or not, I think the car was still in interstate commerce while it was being shunted or kicked onto that track. I believe that the Safety Appliance Act is designed, construing it liberally, [205] to protect a workman in just such circumstances, and I thought that I had explained that rather fully to Mr. Messner. I presume he didn't have an opportunity to tell you personally.

Mr. Boyd: No, Your Honor. But I want to make clear for the record that we object to this instruction because this instruction—of course, it is consistent with Your Honor's previous position taken this morning—does withdraw from the Jury entirely whether the Safety Appliance Act applied. That is a matter of law that the car was in use on the lines, we except to, the instruction on that ground, that it is an instruction that as a matter of law the question of whether or not the car was under repair is not before the jury.

So that we may be clear in the record, Your Honor, I agree, Your Honor, that the instruction is consistent with Your Honor's ruling, but we want to make an exception to that instruction.

The Court: The exception will be noted.

Mr. Boyd: That is the instruction Your Honor gave. It has no number. It begins "Safety Appliance Act required * * *" and ends "* * * if you find for the plaintiff on this issue you should then consider the question of damages." To that we except.

The Court: For your records, let it be noted 'A-1'.

Mr. Boyd: Court's instruction 'A-1'.

The Court: Yes.

Any exceptions? [206]

Mr. Nichols: No, Your Honor.

The Court: Bring in the Jury.

(Whereupon the Jury entered the courtroom and the following proceedings were had in the presence of the Jury.)

The Court: Now I am about to conclude these instructions to you, ladies and gentlemen, and I will be very brief.

I admonish you to use your good sense here just as you would in enacting upon the most vital and important matters affecting your own lives and your own affairs. Take your time. Resolve the facts according to your own calm, deliberate, and cautious good judgment, in the light of your own experience and knowledge of the natural tendencies, proclivities, and propensities of human beings the world over. You are, of course, expected if you *can't* conscientiously do so, to agree upon a verdict the verdict must be unanimous, that is, to say, that all twelve of you must agree upon the verdict. You should freely consult with one another in the jury

room and any one of you, if you should be convinced that your view of the case is erroneous, do not stay with that particular view out of stubbornness or because of any pride of opinion, and do not, therefore, hesitate to abandon your own view under such circumstances.

On the other hand, I want you to remember, and you are instructed, that it is perfectly proper and right to adhere [207] to your own views, if after a full exchange of ideas in the jury room you still believe that you are right.

I finally caution you that if it becomes necessary for you to communicate with the Court during your deliberations, or upon a return to the courtroom with respect to any matter connected with the trial of the case, you should not indicate in any manner to the Court how you stand numerically or otherwise.

Your first duty when you arrive in jury room will be to select a foreman or forelady to preside over your deliberations and to sign whatever verdict you agree upon. I would ask that the foreman preside over your deliberations with decorum and efficiency.

These are important issues to be determined with the plaintiff on one hand and the defendant company on the other. All of the exhibits which are properly in evidence will be available to you upon your notifying the Crier. The Clerk has prepared two forms of verdict. The order in which I read them is of no importance. They contain the title of the case.

"We the Jury find in favor of the defendant." and then there is a place for the signature of your foreman or forelady.

The next form contains the same type of court and cause:

"We the Jury find in favor of the plaintiff and assess the damages against the defendant in the sum of—", and write in whatever amount you determine.

Members of the Jury, the case is now with you for your consideration in this matter.

You may retire.

(Whereupon the Jury retired to the Jury room for deliberation.) [208-A]

[Endorsed]: Filed January 6, 1955.

[Endorsed]: No. 14676. United States Court of Appeals for the Ninth Circuit. Southern Pacific Company, a corporation, Appellant, vs. John Blazin, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: March 2, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14676

SOUTHERN PACIFIC COMPANY, a Corpora-
tion, Appellant,

vs.

JOHN BLAZIN, Appellee.

APPELLANT'S STATEMENT OF POINTS
AND DESIGNATION OF RECORD

Agreeably to Rule 17, paragraph 6, of the Rules of the above Court, appellant Southern Pacific Company, a corporation, makes its statement of points on which it intends to rely and its designation of record as follows:

I.

Statement of Points

The points upon which appellant intends to rely are as follows:

1. The trial court erred in instructing the jury, Court Instruction 1A, that the Federal Safety Appliance Act applied as a matter of law which instruction took from the jury a question of fact, namely, whether or not the car was in use within the meaning of said Act.
2. The trial court erred in failing to instruct that the jury could consider whether or not the car was in use within the meaning of the Federal Safety Appliance Act.

3. The trial court erred in ruling that it would not entertain a defense that the car was not in use within the meaning of the Federal Safety Appliance Act.

4. The trial court erred in excluding evidence offered by the defendant as to the nature and extent of the repairs to be made to the car that would have established more clearly that it was not in use.

5. The court erred in ruling that a car out of service, under repair and not in use was subject to the provisions of the Federal Safety Appliance Act.

6. The action proceeded to trial solely under the provisions of the Federal Safety Appliance Act and said Act had no application in that plaintiff (appellee here) was working on a car that was under repair and therefore not in use within the meaning of said Act. There was no evidence that the car was not under repair and the court should have ruled, as a matter of law, that the car was not in use and the Federal Safety Appliance Act did not apply.

7. The verdict is excessive, as to the amount is unsupported by the evidence as a matter of law, was given under the influence of passion and prejudice, and as to amount is excessive.

8. The trial, was guilty of an abuse of discretion, in denying defendant's motion for a new trial upon the ground that the verdict was excessive and/or, if the same was to be denied, in not denying it conditioned only on a remittitur.

II.

Designation

Appellant hereby designates all of the record which is material to the consideration of this appeal, and designates for printing, the whole of the certified record on appeal, including exhibits appropriate for reproduction when required to be printed by rules of this court when designated, excepting only the following:

- (a) Plaintiff's proposed instructions;
- (b) Defendant's proposed instructions;
- (c) Defendant exhibit "I" in evidence;
- (d) That portion of the certified typewritten transcript containing counsel's arguments to the jury.

Dated: March 7, 1955.

/s/ ARTHUR B. DUNNE,

/s/ DUNNE, DUNNE & PHELPS,

Attorneys for Appellant, Southern
Pacific Company

Affidavit of Service by Mail attached.

[Endorsed]: Filed Mar. 7, 1955. Paul P. O'Brien,
Clerk.

No. ~~14,225~~
14676

In the

United States Court of Appeals

For the Ninth Circuit

SOUTHERN PACIFIC COMPANY,
a corporation,

Appellant,

v.

JOHN BLAZIN,

Appellee.

Appellant's Opening Brief

Appeal from the United States District Court for the Northern
District of California, Southern Division

FILED

A. B. DUNNE

M. H. MESSNER

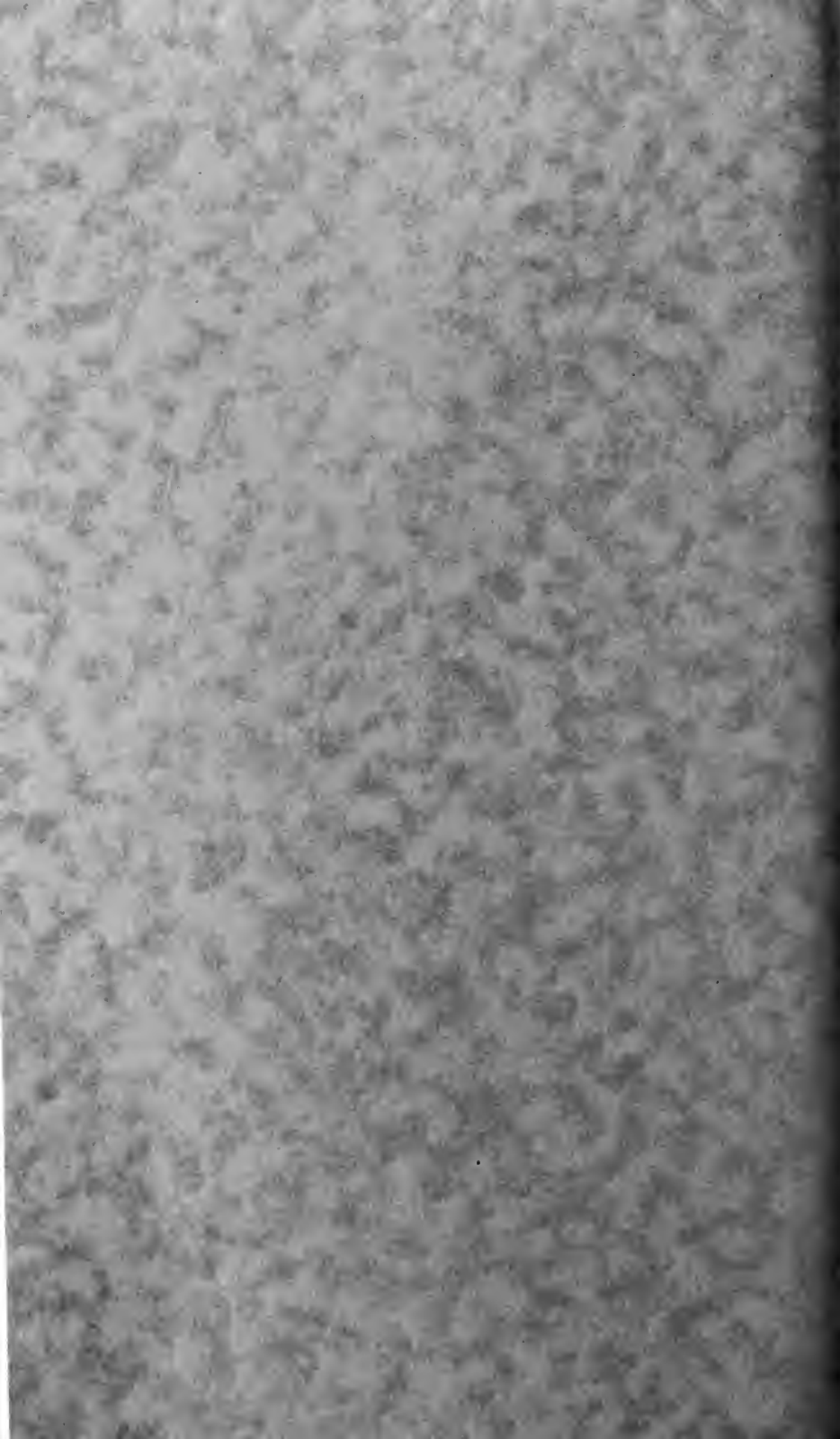
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MAY 13 1955

PAUL P. O'BRIEN, CLERK



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In the
United States Court of Appeals
For the Ninth Circuit

SOUTHERN PACIFIC COMPANY,
a corporation.

Appellant

v.

JOHN BLAZIN.

Appellee

Appellant's Opening Brief

*Appeal from the United States District Court for the Northern
District of California, Southern Division*

I.

**STATEMENT OF THE CASE. JURISDICTION
PLEADINGS AND PROCEEDINGS**

A. Jurisdiction

Plaintiff and appellee, John Blazin, on September 13, 1932, was on the premises of appellant, Southern Pacific Company, at Oakland, California, working for the appellant as a yardman. He and other employees were engaged in moving a Pullman Company¹ car, the "Charlottesville" from

¹ All emphasis by bold-face type, whether or not it is in quoted material is ours.

track No. 34, where it had been for 14 days undergoing repair by The Pullman Company, to track No. 20 where additional repairs were to be made. During this move appellee attempted to board the car to uncouple it. It is his claim that he fell from the car because one of the grabirons was not in place. On November 16, 1953, he sued Southern Pacific Company for \$31,800.00 damages. He claimed under the Coupler, Brake and Grabiron Act, Act of March 2, 1893, C 196, 27 Stat. at L. 531, § 4 (45 USC § 4) and under the Federal Employers' Liability Act (45 USC § 51 ff). The action was commenced in the United States District Court for the Northern District of California, Southern Division.

The jurisdiction of the court below was sustained by § 6 of the Federal Employers' Liability Act (45 USC § 56).

The case was tried in the court below, the court sitting with a jury, November 22 and 23, 1954. At the opening of plaintiff's case, **plaintiff** moved to strike defendant's plea of contributory negligence on the ground that this action was brought **solely** under the safety act. Defendant stipulated that the defense could be stricken, with the added stipulation that the plaintiff would not proceed under the Federal Employers' Act (R. 29, 30). All considerations of negligence on the part of the appellant or of contributory negligence on the part of the appellee were thus eliminated from the case. It was appellant's position, in support of which it undertook to make proof, that the facts did not bring the case within § 4 of the Act of 1893. The trial court ruled peremptorily against this position (R. 120ff; see p. 15 below).

The cause was submitted to the jury solely on the safety act, after the trial court had ruled as a matter of law, that that act applied (court instruction No. A-1 quoted p. 9 below). The jury returned a verdict for plaintiff in the

amount of \$23,050.00 (R. 11). Judgment on the verdict was entered November 24, 1954 (R. 12).

On December 2, 1954, appellant served and filed its notice of motion for new trial (R. 13-15). The motion was heard on December 17, 1954, and was denied in a written opinion, December 29, 1954 (R. 16-23). Thereupon, and within the time allowed by law, defendant, the appellant, perfected this appeal, by notice of appeal filed January 24, 1955 (R. 23).

The jurisdiction of this court is sustained by 28 USC §§ 1291, 1294, 2107 and the Federal Rules of Civil Procedure, Rule 73.

B. Summary Statement of the Case

1. THE ACCIDENT

The car "Charlottesville" involved in this case had been withdrawn from service on September 2, 1952 (Welch, R. 127) and remained out of service until October 5, 1952 (Welch R. 127-131). During this period of time the car was under the control of The Pullman Company (Welch, R. 131) undergoing heavy repair work (Welch R. 133) in the nature of repainting, repairing, upholstery work, repairing electrical work, and repairs to certain mechanical features (Welch R. 127ff). The Pullman Company would withhold the car from being used in service until these repairs were completed (Welch, R. 131). From September 2 until September 15, 1952, this car was being repaired by The Pullman Company on track No. 34 (Welch R. 127ff). Track No. 34 is a repair track (Welch R. 119) in an area of the yard that is set aside for repairs (Moultin R. 112, Welch R. 119). On September 15 incident to further repair the car was moved from track No. 34 to track No. 20 (Blazin R. 92) a heavy repair track (Welch R. 128) in the repair area of the

yard (Moultin R. 112, Welch R. 119). Track No. 34 is a track used by The Pullman Company for the making of repairs (Welch R. 119) while track No. 20 is a repair track upon which the majority of the work is done by Southern Pacific Company (Welch R. 128). There is no evidence to indicate the exact nature of the repairs that would have been performed on track No. 20, however, we do know that the track is classified as a heavy repair track (Welch R. 128) and that the car was ordered into that track for heavy repair work (Welch R. 128) and we do know that The Pullman Company repairs grabirons (Welch R. 128).

There was no evidence of any kind, offered by the plaintiff or otherwise, that on the move from track No. 34 to track No. 20 the car moved or was expected to move over any revenue track or track used in conducting train movements or switching movements (except as an incident of handling cars that were out of service) or over any track except a track of the repair area.

Only three witnesses testified on the issue of liability, appellee Blazin, employed by the appellant as a yardman, Moultin also a yardman employed by appellant and who was called by the appellee, and Welch, a car foreman employed by The Pullman Company (Welch R. 118) who was called by the appellant.

There were no witnesses to the accident and appellee's testimony concerning it is undisputed. In narrative form his testimony is as follows (R. 35 ff) :

On September 15, 1952, at about 11:00 o'clock a.m. the appellee was a member of a yard crew whose duty it was to move the car "Charlottesville" from track No. 34 to track No. 20. The car was standing on track No. 34 together with other cars. To remove it was necessary to pull 8 cars from track No. 34 onto lead track No. 28. The other cars in

this move were defective and bore bad order tags. (Blazin R. 137). The engine with the 8 cars coupled to it backed east out of track No. 34 onto lead track No. 28 and came to a stop. At that point the engine was to shove all of the cars west with the switch lined for track No. 28 and the car "Charlottesville" was to be cut free from the other cars and permitted to roll west on lead track No. 28 toward track No. 20. Just as the move started west on track No. 28 Blazin stepped aboard the "Charlottesville" to uncouple it from the other cars. He got on the right side in the direction of westward-motion at the trailing end. He placed both feet on the lower vestibule step of the car and took hold of the grabiron on the lefthand vestibule post with his left hand and reached for the grabiron on the right hand vestibule post just as the cars started to move. The grabiron on the righthand vestibule post was missing and Blazin fell from the slowly moving car and was struck in the back by the car immediately behind the car "Charlottesville". Had the grabiron on the right hand vestibule door been present Mr. Blazin would have held on to that iron with his right hand while taking hold of the cutting lever with his left hand to separate the car "Charlottesville" from the other cars. (Blazin R. 44).

At the time of the trial appellee was 29 years of age. He had been employed by appellant since May of 1946 in various capacities. His gross earnings were approximately \$430.00 a month and his take-home pay was about \$350.00 per month. (Blazin R. 47).

2. THE INJURIES

Following the accident Mr. Blazin worked for 3 or 4 days (Blazin R. 45). He then laid off work and was off until November 18, 1952, with complaints of back pain (Blazin

R. 45ff). He then worked from November 18, 1952, until September 22, 1953. On the latter date while throwing a switch his back tightened up and he again laid off work and with the exception of two or three days was off work continually until February 1, 1954. (Blazin R. 49ff) In May of 1953, while getting off a car he felt a pain in his groin and a hernia operation was performed on him in December of 1953. There was no hernia present when the appellee was examined by Dr. Fisher in October of 1953 (R. 82). Dr. Fisher was called by the plaintiff and appeared and testified in his behalf. Since his return to duty on February 1, 1954, appellee has worked without taking any appreciable amount of time off (Blazin R. 51).

C. The Pleadings

The pleadings are not significant. The complaint (R. 3-6) was typical for an action of this sort. It sets forth the corporate existence of the defendant and the nature of its business as a common carrier by railroad in interstate commerce and that it operated in the City of Oakland, County of Alameda, State of California. Paragraph III of the complaint reads as follows:

"This action was brought under and by virtue of the provisions of the Federal Employers' Liability Act, 45 U.S.C.A., Sec. 51, et seq., and the Federal Safety Appliance Act, 45 U.S.C.A., Sec. 1, et seq."²

2. The safety act does not provide any remedy for violation. If a party is entitled to its benefits he must seek his remedy under appropriate state law or under the Federal Employers' Liability Act. *Moore v. Chesapeake & Ohio Ry. Co.*, 291 US 205, 210, 78 L ed. 755, *Tipton v. Atchison T. & S. F. Ry. Co.*, 298 US 141, 147, 80 L ed. 1091. In the latter case referring to an earlier case that had caused some confusion the court stated:

"In *Texas & P. R. Co. v. Rigsby*, 241 U.S. 33, 60 L. ed. 874, 36 S. Ct. 482, it was decided that, as the first Safety Appliance Act had been extended by later legislation to equipment used

The complaint alleges the time and place of the accident and the employee status of the appellee followed by the allegation charging violation of the safety act setting forth that the violation was the proximate cause of the injuries sustained, alleges damage generally in the amount of \$30,000.00 and specially in the amount of \$1,800.00 and prays for judgment in the amount of \$31,800.00.

The answer (R. 7-11) admits the corporate existence of the defendant and that it was a carrier engaged in interstate and intrastate commerce in the City of Oakland, County of Alameda, State of California. It admits that on September 15, 1952, plaintiff was employed by appellant as a yardman in the City of Oakland. It further admits that at the time and place the passenger car was being switched and that the car was not equipped with a vestibule handhold on the right side of the vestibule entrance at the B end and further admits that at that time and place the plaintiff made a claim that he had been injured. Appellant denied the other affirmative allegations of the complaint and set up as defenses contributory negligence and sole proximate cause.

Contributory negligence is not a defense under the safety act. It was set up here because of the possibility that appellee had stated a cause of action in negligence under the Federal Employers' Liability Act. Any question in this regard was resolved by the stipulation referred to on page 2 above.

in intrastate transportation upon a railroad which is a highway of interstate commerce, an employee injured as the result of a violation of the act, in respect of a car so used, is entitled to recover for breach of the duty imposed on the carrier. Nothing more was there adjudicated."

D. Ruling of the Trial Court Here for Review

The issues here and the matters about which they revolve can be briefly stated:

As previously stated appellant claims under the Coupler, Brake and Grabiron Act, Act of March 2, 1893, C. 196, 27 Stat. at L 531, § 4 (45 USC § 4) which reads as follows:

“That from and after the first day of July, 1895, until otherwise ordered by the Interstate Commerce Commission it shall be unlawful for any **railroad** company to **use** any car in interstate commerce that is not provided with secure grabirons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars.”

1. After the conclusion of plaintiff's case appellant made an opening statement (quoted p. 11-ff below) in which it was pointed out that the defense to the action would be that the car “Charlottesville” was not in use within the meaning of the act. Following the opening statement appellant's first witness was sworn and before any evidence could be elicited on this the court ruled as a matter of law that it did not intend to entertain such a defense (see specification of error p. 15 below). This ruling eliminated an entire line of testimony in connection with the question of “use” of the involved car.

2. At the conclusion of the evidence the court took from the jury the question of the applicability of the safety act and instructed as a matter of law that that act applied (see specification of errors below, p. 9).

3. Finally, there is a question whether the award was not so excessive that the trial court abused its discretion in unconditionally denying appellant's motion for a new trial and that this court should give relief.

It is believed that the foregoing statement of the question, in general form, when taken with the specification of errors, will sufficiently indicate what we propose to argue.

II.

SPECIFICATION OF ERROR RELIED UPON

1. The court below erred in instructing the jury, Court Instruction A-1 (R 171, 179), that the Safety Appliance Act applied as a **matter of law**. It erred in that as matter of law the Act did not apply and if we are wrong as to this, erred in taking from the jury a question of fact, namely, whether or not the car was under repair, out of service and not in use within the meaning of said Act.

This instruction is as follows:

"The Safety Appliance Act, of which we have been speaking during the course of this trial, required under the facts of this case, that the car, the Charlottesville, be equipped with secure grab-irons. The defendant company admits that the Charlottesville was not equipped with a right-hand grab-iron. The **sole** question you must determine in deciding whether or not the defendant is liable is this:

Did the absence of the grab-iron approximately cause or contribute to the plaintiff's injury?

If you find that it did, you must find for the plaintiff. If you find that it did not, you must find for the defendant.

Since the defendant had an absolute duty to furnish the grab-iron, **you must not concern yourselves with the presence of absence of reasonable care on the part of either the defendant railroad or the plaintiff**. There has been some talk about the Federal Employers Liability Act. You should disregard that entirely. I repeat, the

sole question you should consider in determining whether or not the defendant is liable is the question I have previously related to you:

Did the absence of the grab-iron proximately cause or contribute to the plaintiff's injury?"

At the trial error was assigned (R 177-179) as follows:

"Mr. Boyd: * * *

"Now, as to the instructions,—probably due to my absence—but this new instruction which Your Honor proposed, which has no number, starting with "The Safety Appliance Act required under the facts of this case that the Charlottesville be equipped with * * * grab-irons * * *", Your Honor, I except on the grounds that it takes from the Jury entirely the question as to whether or not this car was in use or whether it was under repair. Now, I don't believe that the matter was taken up by Your Honor this morning and I felt—

The Court: Well—pardon me, I didn't mean to interrupt you but I think that the Court expressed itself rather clearly on that subject this morning. In other words, I took the position that the Safety Appliance Act, first of all, applies. This is a yardman; the car was being shunted or kicked onto the track. Whether for purposes of repair or refurbishing or not, I think the car was still in interstate commerce while it was being shunted or kicked onto that track. I believe that the Safety Appliance Act is designed, construing it liberally, [205] to protect a workman in just such circumstances, and I thought that I had explained that rather fully to Mr. Messner. I presume he didn't have an opportunity to tell you personally.

Mr. Boyd: No, Your Honor. But I want to make clear for the record that we object to this instruction because this instruction—of course, it is consistent with Your Honor's previous position taken this morning—does withdraw from the Jury entirely whether the

Safety Appliance Act applied. That is a matter of law that the car was in use on the lines, we except to, the instruction on that ground, that it is an instruction that as a matter of law the question of whether or not the car was under repair is not before the jury.

So that we may be clear in the record, Your Honor, I agree, Your Honor, that the instruction is consistent with Your Honor's ruling, but we want to make an exception to that instruction.

The Court: The exception will be noted.

Mr. Boyd: That is the instruction Your Honor gave. It has no number. It begins "Safety Appliance Act required * * *" and ends "* * * if you find for the plaintiff on this issue you should then consider the question of damages." To that we except.

The Court: For your records, let it be noted 'A-1'.

Mr. Boyd: Court's instruction 'A-1'.

The Court: Yes."

2. The trial court erred in ruling that it would not entertain the defense the car "Charlottesville" was not in use within the meaning of the safety act and excluding evidence on this issue which defendant proposed to introduce. After the plaintiff had rested defendant made an opening statement as follows (R 116-121):

"Mr. Messner: If the Court please, Mr. Nichols, ladies and gentlemen of the Jury, at this stage of the proceedings the defense counsel has an opportunity to tell you what he thinks the proof is going to be, and what is going to be shown by the remainder of the evidence in the case. From here on the case will be rather brief.

We believe that in the first place that this action is brought on the Federal Safety Appliance Act. As His Honor has already told you, that this is the act that imposes absolute liability on the character—[sic—carrier].

A Juror: We can't understand it.

Mr. Messner: (Continuing) —imposes absolute liability on the character [sic—carrier], where the cars that are in use on its lines are not equipped in accordance with certain specifications.

Now, by the pleadings we have admitted that the car in question was not so equipped. **The only remaining question is, whether or not this car was in use on our lines within the meaning of the Safety Appliance Act.**

We believe that the evidence has already shown that the car was in a repair area in the yard. And, I believe, that you will recall that the evidence has shown that the car was out of service, it was not in use in interstate commerce within the meaning of the act. We believe the evidence will show that the car, Charlottesville, **had been withdrawn from service by the Pullman Company who owned the car** as distinguished from the Southern Pacific Company some two weeks before this accident occurred. And that the car was placed on Track No. 34 in what is known as the Passengers Yard, West Oakland. And the car which was placed there for the purpose of being **generally refurbished and overhauled**. We believe the evidence will show that during the course of these repairs, which consisted of repainting, reupholstering and other items of repair to modernize the car. During the course of those repairs it was necessary, and the car was moved from Track No. 34 down to Track No. 20, where certain other repairs were to be made, and were, in fact, made. Thereafter the car was returned to Track No. 34 and on October 5, twenty days after this accident, the car was then returned to service and put in use on the lines of the Southern Pacific Company. We believe that that is what the evidence will show.

Now, there has been claim here in connection with certain injuries. There was an accident on September 15th, 1952, and that is the only accident that is the subject of this lawsuit. We believe that the evidence

has already shown that there was an accidental injury on September 22nd, 1953. There was something said about a hernia in May of 1953. We believe the evidence has already shown from Dr. Fisher that that hernia was not in existence of October, 1953. We believe that the evidence will show that Mr. Blazin was examined later by a Dr. William Sheppard, Oakland orthopedic surgeon.

Well, rather than tell you what that evidence will show I will have the Doctor in here and he will tell you what he found, and he will give you his conclusions and opinions in connection with Mr. Blazin's health.

I believe that that substantially is what the evidence for the balance of the trial will show, ladies and gentlemen.

Thank you.

WILLIAM J. WELCH

was called as a witness on behalf of the defendant, and being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

The Clerk: Will you state your name and occupation for the Court and Jury?

The Witness: William J. Welch, foreman for the Pullman Company in Oakland.

Direct Examination

Mr. Messner: Q. Mr. Welch, how long have you been employed by the Pullman Company in Oakland?

A. I have been with them over nineteen years, sir.

Q. Now, you do not work for the Southern Pacific Company, do you?

A. No, sir.

Q. Now, what has been your place of employment during these nineteen years that you have worked for Pullman Company?

A. I worked the entire time in the Oakland yard, sir.

Q. Now, September 15th, 1952, Mr. Blazin, who was the plaintiff in this action was injured in Oakland, West Oakland Yard; were you a witness to that accident?

A. No, sir, I wasn't.

Q. Are you familiar, generally, with the tracks in what is known as the Passenger Yard of West Oakland?

A. Yes, sir.

Q. Are familiar with the track that is known as Track No. 34?

A. Yes, sir.

Q. In your job as foreman with the Pullman Company, do you or do you not have charge of the repairs to cars, pullman cars, that come into West Oakland Yard?

A. Yes, sir, I do.

Q. And do you have occasion to make repairs on Track No. 34?

A. Yes, sir, quite often. We make repairs there.

Q. Do you make repairs on Track No. 32?

A. Yes, sir.

Q. You make repairs on Track No. 36?

A. Yes, sir.

Q. Now, in September of 1952, did your company have a program afoot for modernizing and refurbishing cars?

Mr. Nichols: I object to that as incompetent, irrelevant, and immaterial. I, in my opening statement, was going to make a showing that this car had no bad order on it, no bad order sign, and Counsel objected to that. He said that I was without an issue. That negligence was not a matter of issue, limited entirely to the Safety Act. Now, in view of that statement, the defense that he is attempting here, this car was not in service, just doesn't *ly* under the act. If the Court please, the car that was under repair, and to say that the car—that the plaintiff was not working under the provision of the act.

The Court: Do you wish to be heard?

Mr. Messner: If the Court please, and I think perhaps it is a matter—I don't know whether it should be taken up in the presence of the Jury or not.

The Court: It is a matter that I want to take up in the absence of the Jury.

You may be excused for a few minutes, ladies and gentlemen.

(Whereupon the Jury left the Courtroom and the following proceedings were had outside the presence of the Jury.)

The Court: I want to say first of all that **I have anticipated this matter**. And my views on this particular phase of the case are as follows:

Whether or not this car was in the Oakland yards for purposes of repair or not makes no difference in the opinion of this Court. The Safety Appliance Act was designed by Congress to protect workmen and this man was working.

There were, apparently, no bad order indications or signs on the car, and whether there were or were not, Mr. Blazin, if he is to prevail here at all, is certainly entitled to the full coverage of the Safety Appliance Act as designed to give him. I don't think it makes any difference whatsoever whether it was in there for refurbishing or for repairs, it was still engaged in interstate commerce, was being readied for interstate commerce and was actually in interstate commerce. And I hold that actually as a matter of law.

Mr. Messner: Well, if the Court please, there have been numerous decisions, various appellate court in connection with this matter.

The Court: That is my decision, just what I have said.

Mr. Messner: If that is the decision of Your Honor, there is no use of pursuing the matter.

The Court: **Not a particle because I don't intend to entertain that sort of a defense.**

3. The court erred, and abused its discretion in denying appellant's motion for a new trial, upon the ground that the damages awarded were excessive in fact, and as a matter of law, that the award, as to amount, is not supported by the evidence and was the result of passion and/or prejudice. (R. 13-23.)

III.

ARGUMENT

The first two assignments of error, i.e. the ruling excluding evidence and the court's peremptory instruction that the safety act applied as a matter of law, are so closely related that argument upon one point must of necessity bear upon the other. In fact it might be reasonably said that the court's ruling that it would not entertain appellant's defense as a practical matter amounted to the same thing as the subsequent peremptory instruction for the exclusion of all evidence on an issue as surely excludes that issue from the case as an instruction directing that the issue not be considered. Indeed, it goes deeper for it prevents the party ruled against to make a record which would show a fact question. The court excluded proof, as offered in the opening statement **in the language of the statute**, that the car was not in "use".

In the written order denying appellant's motion for a new trial (R. 16ff) the court stated in part as follows:

"2. Applicability of the Safety Appliance Act.

At the close of all the evidence, I took from the jury the question of the applicability of the Safety Appliance Act and instructed that if the admitted absence of the grabiron caused the plaintiff's injury, the jury should find for the plaintiff. During the course of the trial I excluded certain evidence, but I believe that the defendant presented the crux of its case on this point, perhaps in not as dramatic or full sense as it desired,

but the skeleton was clearly defined. Defendant contends the instruction was error."

The statute in question, quoted in full on page 8 above, stated in part, "It shall be unlawful for any railroad company to **use any car** in interstate commerce" etc. The language of this provision is: To violate the statute the carrier must "use" the car. Defendant sought to introduce evidence to establish that the car "Charlottesville" was undergoing a course of repair in a repair yard and that while the car was in this status it was "out of service" and not in "use" within the meaning of the act. Immediately after appellant made its opening statement announcing what its defense would be and before any evidence had been introduced as to the status of the car the court ruled that it would not entertain the defense that this car was not in "use". In referring to the defense in his written opinion the court states: "The skeleton was clearly defined". The appellant believes that in view of the clear language of the statute that it was entitled to submit evidence fully upon this point and that after such evidence had been presented, and if at that time there was contrary evidence, the question of "use" would be one for the jury. However, if there was no contrary evidence and it was shown that the car was not in "use" appellant would then have been entitled to a peremptory instruction that the safety act did **not** apply.

Not only was this evidence excluded but there was no evidence, introduced by the plaintiff responsive to his burden of proof, that the car "Charlottesville" was not undergoing a course of repair. There is abundant evidence that the involved tracks are in a repair area of the yard. Indeed, appellee's counsel in his opening statement (R. 31) states, "and then they have another track that feeds off into a number of—not feeder tracks, but tracks where they permit

the cars to remain when **not in use**. Storage tracks, I think they are called." Appellee himself testified concerning the tracks on direct examination as follows (R. 38):

"Q. And when a Pullman car is **not in use** is that where it is placed?

A. **That's right.**" (R. 38)

Appellee's witness Moulton testified (R. 112), "All tracks over there in the Southern Pacific are repair tracks in this area."

The nature of the tracks upon which the car "Chorlottesville" was moved is an important consideration. If all of the tracks involved are repair tracks then car movements made on such tracks, incident to repair, would not be "use" of the car within the meaning of the statute. (*Kaminski v. Chicago, Etc. R.R. Co.*, 180 Minn. 519, 231 NW 189, (cert. den.) 282 US 872, 72 L ed. 770 (1930).) This repair area of the yard is analogous to a shop where automobile repairs are made. During the course of repairs to an automobile it may be necessary to move it from a rack upon which wheels are aligned, to another point in the shop where motors are overhauled and thence again to a lubrication pit. Such movement would be made, incident to and to facilitate the repairs. No one would be so bold as to suggest that an automobile in a shop for repairs should meet the same safety standards as an automobile that is in use upon the highways. Safety statutes for automobiles governing their brakes and lights etc., would not apply to a vehicle in a shop being prepared and repaired to meet those standards. The only difference between a shop for automobiles and a repair yard for freight cars is that the freight cars require a larger area because of the difference in size of the vehicles and the freight cars can be moved only upon rails. The determining factor in the character of a track is not the

name that is given it but the use to which it is put. Mr. Welch testifies that the tracks are used for repairs (R. 119, 128). Mr. Moulton testifies that all of the tracks in this area are repair tracks (p. 18 above). Appellee concedes with some reluctance that these are tracks where cars are worked on and that the term "storage track" is nominal rather than descriptive (R. 93-94).

"Q. Now, when you say storage track you mean it is a track, that is the name of a nominal thing that you refer to as a storage track is that right?

A. That's right.

Q. Do you know what those tracks are used for?

A. To store the cars.

Q. Do you know what is done with the cars while they are stored, or doesn't your experience go that far?

A. They are cleaned to be ready to go on their next trip.

Q. They are maintained and cleaned and repaired, is that right?

A. Well, I don't know just what the repair men do, I know they are cleaned.

Q. You know they are worked on?

A. That's right."

The testimony from all of the factual witnesses in the case establishes that the tracks involved were in a repair area of the yard and were used for repair purposes.

In *Kaminski v. Chicago, etc. RR Co.*, supra, at page 190, the court stated:

"We understand these cases to hold that, although a car with defective appliances is being moved for the purpose of taking it out of service and placing it at the point where it is to be repaired, it is within the operation of the Safety Appliance Act during such movement. But we have been cited to no case and know of

none which goes to the extent of holding that a car with defective appliances which has been **taken out of service and has been placed on a repair track to be repaired** in a yard used exclusively for the purpose of making repairs, and which is **actually in process of being repaired**, is still within the operation of the Safety Appliance Act.”³

The only testimony concerning the status of the car is from Welch. In summary form his testimony (R 127) is that the car was placed on track No. 34 on September 2, [1952] and remained in this yard until released for service on October 5, 1952. During that period of time it was undergoing what is characterized as “heavy work” (R 133). In the *Kaminski Case* the court stated, at page 191:

“We reach the conclusion that, where a bad order car has been withdrawn from service and taken to and placed in a repair yard where it is being repaired, subsequent movements of the car **made in the course of the work and for the purpose of facilitating it** are not within the operation of the Safety Appliance Act.”

See also the syllabus by the court in *Netzer v. Northern Pacific Ry. Co.*, 238 Minn. 416, 57 NW2d 247, 248 (1953).⁴

3. The *Kaminski Case* is under the same statute as the one under which appellee claims the involved car was being moved from one track in the repair area to another track for further repairs. Plaintiff was a switchman assisting in the moving of the cars. As he attempted to board the involved car a grabiron pulled off because the bolts on the inside of the car had been burned off with an acetylene torch incident to repair. Plaintiff fell and was injured. The court held that the car had been withdrawn from service and was not within the operation of the safety appliance act.

4. The *Netzer Case* is under 45 USC § 11 in which an employee fell from a car standing on a repair track. This court held that the car was not being “used” within the provisions of the safety act.

The case contains an excellent discussion concerning all of the

To bring himself within the coverage of the safety act the appellee must establish not only that the defect existed but that the car was in "use" within the meaning of the act. (*Myers v. Reading Co.*, 331 US 477, 91 L ed. 1615.)⁵

The word "use" as it appears in the act must be given meaning. The exact wording is "to use any car in interstate commerce". We can fairly assume that this language means at least use in some sort of commerce or to put the car to some commercial use. During the course of repairs a car

cases in point and distinguishes those that are not in point.

"Syllabus by the Court.

"1. Federal Safety Appliance Act, 45 U.S.C.A. § 11, which makes it unlawful for a common carrier to permit to be used on its line any car not equipped with efficient hand brakes, has no application to car removed from train and placed on track for the specific purpose of having repairs made thereto.

"2. Cases cited in support of contrary view involve accidents which occurred while car was being switched in the yards; or while it was in process of being removed to a repair track; or while it had been placed on a siding as distinguished from a repair track and, hence, had not yet been removed from use on lines.

"3. Fact that defective car was loaded with merchandise and consigned and previous to removal to repair track for repair had been part of freight train *held* not controlling on question whether § 11 of the Federal Safety Appliance Act is applicable. Governing factor which prevents application of act is removal of car from use on line to repair track for purpose of repair." (Italics in original material.)

5. In the *Myers Case* a verdict was found in favor of the plaintiff. Defendant's motion to set aside the verdict was granted. The question was whether there was evidence from which the jury could infer that a hand brake was inefficient and thus violated 45 USC § 11. The court found that there was sufficient evidence and stated:

"* * * A railroad subject to the Safety Appliance Acts may be found liable if the jury reasonably can infer from the evidence merely that the hand brake which cause the injuries was on a car which the railroad was **then using on its line**, in interstate commerce, and that the brake was not an 'efficient' hand brake. * * *"

is not serving any useful purpose and it cannot be put to the use for which it was intended. While in the repair process it is a liability or a detriment to the carrier and only upon completion of the repairs can the car be returned to useful service or use in commerce. Repairs are prior and precedent to use. They are restorative in character and are designed to permit subsequent use. Only by repair process can the carrier comply with the statute. The "use" requirement in the statute is a limitation on the absolute liability imposed by it to permit compliance. *Baltimore & Ohio R. Co. v. Hooven*, 297 Fed. 919, Circ. 6, 1924.⁶

"The act forbids the 'use' or 'hauling on its line' of prescribed cars. Whatever ambiguity lies in the statute results from the susceptibility of the term 'use' to an interpretation equivalent in meaning to the terms 'employ' or 'engage,' or the phrase 'habitually use,' as distinguished from the term 'use' as implying actual present use. Having in mind the broad aims and purpose of the statute and its specific provisions, we think there can be no doubt as to the meaning of its prohibitory clause. The statute imposes an absolute liability on the carrier to equip its vehicles with safety appliances and to keep such appliances secure. **The act of equipping the vehicle originally with the safety appliances and the act of repairing an appliance which becomes defective in use are acts in compliance with and not in violation of law, and are not in our judgment acts which the law intends to penalize.** The process of conditioning an engine and preserving it from deterioration through rust by spraying it with oil appears to be, so far as this record is concerned, the usual and

6. The *Hooven Case* is under 45 USC § 11 and deals with a locomotive which was standing in the roundhouse. An employec slipped and fell because the grabirons of the locomotive were covered with oil. The court held that the statute had no application because the equipment was not being used on its lines within the meaning of the act.

necessary treatment of the engine during monthly inspection, contributing to the safety of the apparatus while in actual use. If during such treatment the safety appliances are rendered temporarily insecure by the presence of oil upon them, it does not seem to us to present a condition that comes within the purview of the act, when as in this case the engine is completely withdrawn from all relationship to the highways of interstate commerce, and from all connection with the movement of trains thereon.

“* * * Such diligence seems also to be imposed on the carrier by the Boiler Inspection Act (Comp. St. § 8630 et seq.) and related statutes. Can it be said that it is the intention of the Safety Appliance Act to penalize such diligence by extending the absolute liability of the carrier through the period of replacement and repair, and reaching even a case where the insecure condition of the appliance which failed was the natural and temporary result of the reconditioning process? We think such contention untenable, unless supported by specific direction of the statute.”⁷

7. *Brady v. Terminal R. Asso. of St. Louis*, 303 US 10, 13, 82 L ed. 614. This is a case in which the involved car had not yet reached the point of repair. However, in its opinion the Supreme Court cites with approval *Baltimore & O. R. Co. v. Hooven*, supra, and *New York C. & St. L. R. Co. v. Kelly*, infra:

“* * * The ‘use, movement or hauling of the defective car, within the meaning of the statute, had not ended when petitioner sustained his injuries. *Chicago G. W. R. Co. v. Schendel*, 267 U.S. 287, 291, 292, 69 L. ed. 614, 617, 45 S. Ct. 303. The car had been brought into the yard at Granite City and placed on a receiving track temporarily pending the continuance of transportation. If not found to be defective, it would proceed to destination; if found defective, it would be subject to removal for repairs. **It is not a case where a defective car has reached a place of repair.** See *Baltimore & O. R. Co. v. Hooven* (C.C.A. 6th) 297 F. 919, 921, 923; *New York C. & St. L. R. Co. v. Kelly* (C.C.A. 7th) 70 F. (2d) 548, 551. **The car in this instance had not been withdrawn from use.**”

In considering this question of "use" the Seventh Circuit in 1949 in *Lyle v. Atchison, T. & S. F. Ry. Co.*, 177 F2d 221, cert. den. 339 US 913, 92 L ed. 1339, the court stated:

"Liability under the Act in question, like that under the Safety Appliance Act, 45 U.S.C.A. § 1 et seq., depends not upon negligence but is an absolute one to obey the statutory requirements. For this reason Congress, obviously, in framing each of the Acts, in consideration of the unconditional duty to have cars and locomotives in such condition as not to put in peril life or limb while in use imposed upon the carrier, **likewise limited the absolute liability to cars and locomotives while in use 'on the line.'** In other words, when a locomotive or car is in 'use on the line,' the mandatory duty of the carrier attaches **and when the car or engine is not so in use then the duty under the express provision of the statute does not exist.**

"* * * **To service an engine while it is out of use, to put it in readiness for use, is the antithesis of using it.** To apply the mandatory liability in favor of one who puts an engine in readiness for use is to enlarge and extend the intent of Congress in enacting the legislation."⁸

The fact that it was necessary to move the car "Charlottesville" did not return it to service and put it in "use" within the meaning of the act. **It could not be returned to service until released by The Pullman Company.** In the

8. The *Lyle Case* involves an injury to an employee who brought his action under 45 USC § 23. He was injured while working on a locomotive standing in a roundhouse due to the presence of oil and grease on the steps and ladder of the tender. Defendant appealed from the judgment in favor of the plaintiff, urging that the locomotive was not in use within the meaning of the statute. The court reversed, and stated that the trial court should have directed a verdict for defendant. In accord, *Tisneros v. Chicago & Northwestern Ry. Co.*, 197 F2d 466 (Circ. 7, 1952, cert. den. 344 US 885, 97 L ed. 121); *Compton v. Southern Pacific Co.*, 70 CA2d 267 (1945) 161 P2d 40.

case of *New York C. & St. L. R. Co., v. Kelly*, 70 F 2d 248, 550 (Circ. 7, 1934), cert. den. 293 US 595, 79 L ed. 689, the court stated:

"After a defective car reaches the place of repair, the Safety Appliance Act is inapplicable because such car has been withdrawn from service and is not 'in use' under the provisions of the act, nor does mere shifting of cars within the place of repair put the car 'in use' within the meaning of the statute. [Citing cases]

"* * * Had the car in question been en route to the repair place, a different situation would have been presented, but after it reached the repair place, was out of service, the carrier was entirely within its rights in taking off the handhold or any other of the safety appliances necessary to effect the repairs, without violating the Safety Appliance Act."

Two earlier cases also appear to be in point in connection with the movement of the car. *Siegel v. New York Cent. & H. R.R.R.*, 178 Fed. 873, 876 (Circuit Court M.D. Penn.,—1910) said:

"* * * that the necessary movement of a defective car by itself, for the purpose of repair only, and not in conjunction with cars commercially used, does not subject the carrier to the penalties of the law. Repair shops, as it is pertinently said, cannot be kept on wheels; and a carrier may therefore move one or more defective cars by themselves to such shops, for the purpose of

9. The *Kelly Case* is brought under 45 USC § 11. Plaintiff, a brakeman, was switching cars on a repair track. The engine entered the repair track with interstate cars attached to the engine and unintentionally moved the involved car which was standing on that track. The plaintiff climbed up the ladder to set the brake on the car and as he reached for the top grabiron he fell because it was missing, and was injured. At the trial, there was a verdict in favor of plaintiff. The court reversed, and stated, "Since it is so clear that the car was not in use, it was erroneous to submit the case to the jury." (See footnote 7 above.)

having them put in a condition to conform to the requirements of the safety appliance acts, provided such cars are excluded from commercial use themselves, and from connection with other cars which are being used commercially."

Note also the language of the court in *Southern Railway Co. v. Snyder*, 187 Fed. 492, 497 (Circ. 6,—1911):

"While a carrier may move empty cars by themselves to repair shops for the purpose of having them placed in condition to comply with the safety appliance acts, without being guilty of a violation of those acts while engaged in an honest effort to meet their requirements, yet the cars, in any movement for the purpose of repairing them after they so become defective, must, in order not to be subject to the act, be wholly excluded from commercial use themselves and from other vehicles which are commercially employed."

Note also the language of *Sherry v. Baltimore & O. R. Co.*, 30 F2d 487, 488 (Circ. 6, 1929) cert. den. 280 US 555, 74 L ed. 611:

"* * * It will therefore be noted that not only is absolute liability independent of negligence conditioned upon **use** of defective equipment by the defendant, but that the abolition of the defense of assumption of risk is similarly effective only when the defective equipment is *in use* contrary to the provisions of statute."¹⁰ (Emphasis by italics is the court's.)

Appellee failed to bring his case within the provisions of the safety act in that he did not establish that the car

10. This is an action under 45 USC § 11. The injured employee was a car inspector who was injured while attempting to operate the brake on a car that was standing on a ladder track. It was the employee's duty to inspect the car and determine what repairs would be necessary. The court held that the car was not in use within the meaning of the statute.

"Charlottesville" was in "use". He failed to establish that the car was not under repair; he failed to show that the tracks were not repair tracks or that the involved tracks were revenue or commercial tracks; he failed to introduce any evidence that the car "Charlottesville" was at any time used in commerce either before or after the accident. All of these things are determinative of "use" of the car within the meaning of the statute and failure to establish this element is failure to make a prima facie case.

It is appellant's position that because there is no proof of "use" of the car that it should have been entitled to a peremptory instruction that the act did **not** apply as a matter of law. Under these facts, at the very least, the appellant was entitled to have the questions of fact concerning the nature of the tracks and the status of the car determined by the jury. (*Gunning v. Cooley*, 281 US 90, 94, 74 L ed. 720; *Tennant v. Peoria & P.U.R. Co.*, 321 US 29, 35, 88 L. ed. 520; *Lavender v. Kurn*, 327 US 645, 90 L. ed. 916; *Tiller v. Atlantic Coast Line R. Co.*, 318 US 54, 87 L. ed. 610.)

A jury question was presented even though the trial court in its ruling excluded the major portion of appellant's evidence in connection with the defense that the car was not in "use."

All of the cases cited by appellant concerning the repair of equipment and determination of its "use" and the very language of the statute itself indicate that the defense urged by the appellant was a proper one and evidence concerning it should have been admitted (Fed. Rules Civ. Proc., Rule 43 (a)).

The lower court, with deference, in a case of claimed liability under a statute imposing absolute liability but conditioning it upon "use" of the car in question mistakenly applied the interstate commerce test of the Federal Employers' Liability Act where the duty is less rigorous, liability is

imposed only for negligence and contributory negligence is a partial defense in reduction of damages. Under this latter statute it is enough to show that repair work furthers interstate commerce (*So. Pac. Co. v. I.A.C.*, 19 C2d 271, 120 P2d 880). There is no requirement that the car be in use. The question is not whether the car was in use in interstate commerce in the constitutional sense (as the lower court seemed to think a question under the FELA) but whether it was in "use" within the **statutory** sense of 45 USC § 4.

The cases in which application of the safety act was proper have not been cited to be distinguished because this task is so fully performed by the opinion in the *Netzer Case* cited at p. 20 above.

The trial court's opinion, denying appellant's motion for a new trial, relies on the *Texas & P. Ry. Co. v. Rigsby*, 241 US 33, 60 L ed. 874 (1915). The case is distinguished in several of the cases cited herein¹¹ and its findings limited by the holding in *Tipton v. Atchison, T. & S. Fe Ry. Co.*, *supra* (see footnote 2 above).

The following additional distinguishing features are apparent. In the *Rigsby Case* the car had not reached the repair tracks at the time of the accident, not only was it switched over a mainline track but was left standing upon the mainline and so switched and so standing endangered interstate train operations. The trial court felt there should be no difference between the two cases. The case is one in which the involved car had not as yet been removed from service, it was still in use, it bore the same relationship to trains operating on the main tracks as it would have borne had it been in an interstate train.

11. *Lyle v. Atchison T. & S. F. Ry. Co.*, *supra*; *Kaminski v. Chicago M., St. P. & P. R. Co.*, *supra*; *Netzer v. N. P. Ry. Co.*, *supra*.

THE VERDICT IS EXCESSIVE

In a case which, on its facts, is proper for the exercise of the power, this court has the power to give relief if an award of damages is excessive as a matter of law or is the result of passion and prejudice. (*Cobb v. Lepisto*, 6 F2d 128, 129 (Circ. 9); *Department of Water and Power v. Anderson*, 95 F2d 577, 586 (Circ. 9); *Southern Pacific Company v. Guthrie*, 186 F2d 926 (Circ. 9); *Covey Gas & Oil Co. v. Checketts*, 187 F2d 561 (Circ. 9).)

The court, in its order denying appellant's motion for a new trial, states (R. 16):

"I recognize that the trial judge is not a mere arbiter but the question of the amount of damage is primarily for the jury. **While the amount of the verdict may be relatively large**, it is not so large as to shock the court's conscience or sense of justice. It will not be set aside."

For clarity in understanding the medical testimony the following significant facts are set forth in chronological order:

Injury	September 15, 1952	
Return to work	November 18, 1952	(R. 47)
Felt pain in groin	May, 1953	(R. 50)
Back re-injured	September 22, 1953	(R. 50)
• (laid off work)		
Examined by Dr. Fisher	October 23, 1953	(R. 61)
(No hernia present on that date (R. 82))		
(Recommended treatment back brace (R. 72))		
Hernia operation	December, 1953	(R. 50)
Return to work	February 1, 1954	(R. 51)
Examined by Dr. Fisher	August 10, 1954	(R. 72)
(Not wearing back brace as recommended (R. 81))		
Examined by Dr. Sheppard	August 10, 1954	(R. 140)
Examined by Dr. Fisher	October 28, 1954	(R. 78)

(On November 22, 1954 appellee testified he was wearing back brace which had been prescribed by Dr. Fisher approximately six weeks before the trial (R. 55) the brace must have been perscribed by the doctor on October 28, 1954, less than one month before the trial.)

Two doctors testified to the medical facts in this case. Dr. Fisher who treated the appellee (R. 55) appeared and testified on his behalf. Dr. Sheppard, who examined on behalf of the appellant, appeared and testified. Dr. Fisher diagnosed appellee's condition as an acute neck strain, bilateral parascapular strain and a strain of the low back (R. 69). Dr. Sheppard's diagnosis was a bruising of the musculature of the back (R. 147 ff). Each of the doctors testified that their x-ray examinations were negative (Fisher R. 82, Sheppard R. 142 ff), that back motion was within normal range (Fisher R. 83, Sheppard R. 142), neurological examination essentially negative (Fisher R. 82, Sheppard R. 144), and that reflexes were normal (Fisher R. 83, Sheppard R. 143).

Appellee did not receive any treatment by a doctor for his back condition from the time he returned to duty on November 18, 1952, until the date of the second injury on September 22, 1953 (Blazin R. 48, 49). The testimony of Dr. Fisher in connection with the second injury is significant.

"Q. Now, Doctor, from your examination and from the history, in your opinion is there any connection in the complaints that he complained to you about here, on August 10th, that you would relate it to the accident that he had in September of '52?

A. Yes, I believe that they resulted from that accident and also this **re-injury of his upper back in November of '53**, I believe it was."

This action is solely for injuries sustained on September 15, 1952, the term "re-injury" does not mean exacerbation but to "injure over again."

The verdict is for \$23,050. It was awarded to a 29-year-old yardman. He worked for two days following the accident and was then off work for a period of two months. During this time off he was paid for a two-week vacation. He then worked for a period of some ten months and on September 23, 1953, he was involved in an accident throwing a switch following which he remained off work until February 1, 1954, a total of four months and eight days. During this period of disability he was paid for a two week vacation and was operated on for a hernia. The hernia could not possibly have come from the accident here sued on. Plaintiff testifies that he felt a tingling sensation in his groin in May of 1953 when he got off a car (R. 50) and the hernia was not present when Dr. Fisher examined the plaintiff in October of 1953 (R. 82). Assuming that all of plaintiff's disability is chargeable to the accident he lost only a total of 2 months in the first instance and 4 months and 8 days in the second instance, or a total of 6 months and 8 days. True, plaintiff testified that he had lost some time between his return to duty on November 18, 1952, and the accident of September 22, 1953. Defendant's Exhibit "H" in evidence indicates that there was a total of 309 working days from November 18, 1952, through September 22, 1953. Under union contract yardmen were working a five day week (R. 134). In this period of time Mr. Blazin worked a total of 246 days. This was a period of time amounting to 44 weeks. Had he worked only five days a week he would have worked 220 days and been off work 88 days. Of this total time off, ten to fifteen days was taken off for personal reasons and not due to physical condition (R. 58). Plaintiff lost in wages during the six and one-half months off work a gross of \$2,795.00

and a net of \$2,275.00 (R. 47). In addition, plaintiff had medical expense for supplies and medication of \$29.00 (R. 53) and for treatment to Dr. Fisher, \$27.50 (R. 80). The total special damages would, therefore, be a gross of about \$2,850.00 or a net of about \$2,230.00. By this verdict plaintiff would be paid \$20,200 in excess of his specials for intangible items not supported by the evidence herein. **There is no testimony in the record from the plaintiff or the doctors who appeared indicating any future work disability.** There is no testimony of probative certainty that there will be any future medical expense, nor is there testimony indicating that there will be any future loss of earnings or earning power.

CONCLUSION

It is respectfully submitted that the judgment must be reversed.

A. B. DUNNE

M. H. MESSNER

DUNNE, DUNNE & PHELPS

Attorneys for Appellant

No. 14680

United States
Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

TEXAS INDEPENDENT OIL COMPANY,
INC., Respondent.

Transcript of Record

Petition for Enforcement of an Order of the National
Labor Relations Board

FILED

JUL 11 1955

PAUL P. O'BRIEN, CLERK



No. 14680

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Court of Appeals
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GENERAL COUNSEL'S EXHIBIT No. 1-A

United States of America
National Labor Relations Board

CHARGE AGAINST EMPLOYER

Case No. 33-CA-230. Date filed: May 19, 1953.
Compliance Status checked by: J.K.N.

* * * * *

1. Employer against whom charge is brought:
Texas Independent Oil Company, 1841 West Linden,
Phoenix, Arizona.

No. of workers employed: 11.

Nature of employer's business: Transportation of
petroleum products.

The above-named employer has engaged in and
is engaging in Unfair Labor Practices within the
meaning of Section 8(a) Subsections (1) and (3)
and (5) of the National Labor Relations Act, and
these Unfair Labor Practices are Unfair Labor
Practices affecting commerce within the meaning
of the Act.

2. Basis of the charge:

On or about May 11, 12 and 15, 1953, the Texas
Independent Oil Company, through its officers,
agents and employees, interfered with, restrained
and coerced its employees in the exercise of the
rights guaranteed in Section 7 of the Act by in-
terrogating them regarding their membership in
Teamsters Local 310, a labor organization.

Said employer, through its officers, agents and
employees, on or about May 15, 1953, terminated the

employment of John E. Cox and William J. Johnson because of their membership and activities in behalf of said labor organization to discourage membership therein.

By the acts set forth in the paragraphs above and by other acts and conduct, it by its officers, agents and employees, interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

3. Full name of labor organization, including local name and number, or person filing charge: International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 310.

4. Address: 267 South Stone Avenue, Tucson, Arizona. Telephone No. 4-1131.

5. Full name of national or international labor organization of which it is an affiliate or constituent unit: International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of Amer.

6. Address of national or international, if any: 100 Indiana Ave., N. W., Washington 1, D. C.

7. Declaration: I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

/s/ By **HOWARD D. GRANT,**
President

Date: May 16, 1953.

GENERAL COUNSEL'S EXHIBIT No. 1-C

United States of America
National Labor Relations Board

AMENDED CHARGE AGAINST EMPLOYER

Case No. 33-CA-230. Date filed: May 28, 1953.
Compliance status checked by: J.K.N.

* * * * *

1. Employer against whom charge is brought:
Texas Independent Oil Company, 1841 West Linden, Phoenix, Arizona.

Number of workers employed: 11.

Nature of employer's business: Transportation of petroleum products.

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a), Subsections (1) and (3) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the act.

2. Basis of the charge:

On or about May 11, 12 and 15, 1953, the Texas Independent Oil Company, through its officers, agents and employees, interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act by interrogating them regarding their membership in Teamsters Local 310, a labor organization.

Said employer, through its officers, agents and employees, on or about May 15, 1953, terminated the employment of John E. Cox and William J.

Johnson and on May 25, 1953, terminated the employment of E. W. Richins, Jr., because of their membership and activities in behalf of said labor organization to discourage membership therein.

By the acts set forth in the paragraphs above and by other acts and conduct, it by its officers, agents and employees, interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

3. Full name of labor organization, including local name and number, or person filing charge: International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 310.

4. Address: 267 South Stone Avenue, Tucson, Arizona. Telephone No. 4-1131.

5. Full name of national or international labor organization of which it is an affiliate or constituent unit: International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers.

6. Address of national or international, if any: 100 Indiana Ave., N. W., Washington 1, D. C.

7. Declaration: I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

/s/ By FRED A. BONE,
Secretary Treasurer

Dated: May 28, 1953.

GENERAL COUNSEL'S EXHIBIT No. 1-E

United States of America
National Labor Relations Board

SECOND AMENDED CHARGE AGAINST
EMPLOYER

Case No. 33-CA-230. Date filed: August 3, 1953.
Compliance Status checked by: LH.

* * * * *

1. Employer against whom charge is brought:
Texas Independent Oil Company, 1841 West Linden,
Phoenix, Arizona.

Number of workers employed: 21.

Nature of employer's business: Transportation of
petroleum products.

The above-named employer has engaged in and is
engaging in unfair labor practices within the meaning
of Section 8(a), Subsections (1) and (3) of the
National Labor Relations Act, and these unfair
labor practices are unfair labor practices affecting
commerce within the meaning of the Act.

2. Basis of the charge:

The above-named employer by its officers, agents
and representatives terminated the employment of
the following named employees, on the dates stated
because of their membership in and activities in
behalf of Int'l. Bhd. of Teamsters, Chauffeurs,
Warehousemen, and Helpers of America, Local
Union No. 310, a labor organization, and to discourage
membership in said labor organization,
and at all times since their discharge the above-

named employer has refused to reinstate the named employees:

William J. Johnson, May 15, 1953.

John Cox, May 15, 1953.

E. W. Richins, Jr., May 25, 1953.

Harry Almada, June 3, 1953.

On or about May 11, 12 and 15, 1953 it by its officers, agents and employees interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act by interrogating them regarding their membership in International Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 310, a labor organization.

By the acts set forth in the paragraphs above and by other acts and conduct, it by its officers, agents and employees interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

3. Full name of labor organization, including local name and number, or person filing charge: Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local Union No. 310, AFL.

4. Address: 267 S. Stone Avenue, Tucson, Arizona. Telephone No. 4-1131.

5. Full name of national or international labor organization of which it is an affiliate or constituent unit: Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers.

6. Address of national or international, if any: 100 Indiana Avenue, N. W., Washington 1, D. C.

7. Declaration: I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

/s/ By HOWARD D. GRANT,
President

Date: 8/1/53.

GENERAL COUNSEL'S EXHIBIT No. 1-G

United States of America
National Labor Relations Board

THIRD AMENDED CHARGE AGAINST
EMPLOYER

Case No. 33-CA-230. Date filed: August 11, 1953.
Compliance Status checked by: LH.

* * * * *

1. Employer against whom charge is brought:
Texas Independent Oil Company, Inc., 1841 West
Linden, Phoenix, Arizona.

Number of workers employed: 21.

Nature of employer's business: Transportation of
petroleum products.

The above-named employer has engaged in and is
engaging in unfair labor practices within the mean-
ing of Section 8(a), Subsections (1) and (3) of the
National Labor Relations Act, and these unfair
labor practices are unfair labor practices affecting
commerce within the meaning of the Act.

2. Basis of the charge:

The above-named employer by its officers, agents
and representatives terminated the employment of

the following named employees, on the dates stated because of their membership in and activities in behalf of Int'l. Bhd. of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, Local Union No. 310, a labor organization, and to discourage membership in said labor organization, and at all times since their discharge the above-named employer has refused to reinstate the named employees:

William J. Johnson, May 15, 1953.

John Cox, May 15, 1953.

E. W. Richins, Jr., May 25, 1953.

Harry Almada, June 3, 1953.

On or about May 11, 12 and 15, 1953 it by its officers, agents and employees interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act by interrogating them regarding their membership in Int'l. Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 310, a labor organization.

By the acts set forth in the paragraphs above and by other acts and conduct, it by its officers, agents and employees interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

3. Full name of labor organization, including local name and number, or person filing charge: Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 310, AFL.

4. Address: 267 S. Stone Avenue, Tucson, Arizona. Telephone No. 4-1131.

5. Full name of national or international labor organization of which it is an affiliate or constituent unit: Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America.

6. Address of national or international, if any: 100 Indiana Avenue, N. W., Washington 1, D. C.

7. Declaration: I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

/s/ By HOWARD D. GRANT,
President

Date: August 8, 1953.

GENERAL COUNSEL'S EXHIBIT No. 1-J

United States of America

Before the National Labor Relations Board
Sixteenth Region

Case No. 33-CA-230

In the Matter of TEXAS INDEPENDENT OIL
COMPANY, INC., and INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHAUF-
FEURS, WAREHOUSEMEN AND HELPERS
OF AMERICA, LOCAL UNION No. 310, AFL

COMPLAINT

It having been charged by International Brother-
hood of Teamsters, Chauffeurs, Warehousemen and
Helpers of America Local Union No. 310, AFL,
under dates of May 19, 28, August 3, and 11, all in

1953 that Texas Independent Oil Company, Inc., hereinafter referred to as respondent, has engaged in and is now engaging in certain unfair labor practices affecting commerce, as set forth and defined in the Labor Management Relations Act, 61 Stat. 161, hereinafter referred to as the Act, the General Counsel for the National Labor Relations Board, hereinafter referred to as the Board, by the Regional Director for the Sixteenth Region of the Board, hereby alleges as follows:

1. Respondent is and has been at all times material hereto, a corporation duly organized under and existing by virtue of the laws of the State of Arizona, having its principal office and place of business at 1841 W. Linden in the City of Phoenix, Arizona, and is now and has been at all times herein mentioned continuously engaged at said place of business, in the transportation of gasoline and petroleum products.

2. Respondent in the course and conduct of its business, during the twelve-month period ending June 30, 1953, which period is representative of all times material hereto, purchased equipment consisting principally of trucks, tractors, trailers and related products, valued in excess of \$75,000.00 of which more than 85 per cent was shipped in interstate commerce to said place of business, from points outside the State of Arizona. During the same period, respondent sold and transported products consisting principally of gasoline and petroleum products valued in excess of \$1,000,000.00 of which more than 95 per cent was shipped in inter-

state commerce from points outside the State of Arizona to points located in the State of Arizona.

3. Copies of the charges hereinabove referred to were served on respondent by registered mail on May 19, 28, August 3, and 11, all in 1953.

4. International Brotherhood of Teamster, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 310, AFL, hereinafter referred to as the union, is a labor organization within the meaning of section 2, subsection (5) of the Act.

5. Respondent did on or about the respective dates listed alongside each name, discharge those employees whose names are set forth as follows:

John Cox, May 15, 1953

William J. Johnson, May 15, 1953

E. W. Richins, Jr., May 25, 1953

Harry Almada, June 3, 1953

6. Respondent has, since the date of discharge listed above in paragraph 5, failed to, refused to and continues to refuse to reinstate the employees named above to their former or substantially equivalent positions or employment.

7. Respondent did discharge and refuse or fail to reinstate employees named above in paragraph 5 for the reason that they joined or assisted the union or engaged in other concerted activities for the purposes of collective bargaining or other mutual aid or protection.

8. Respondent, through its officers, agents and employees, from on or about April 11, 1953 to date, has interrogated its employees concerning their union affiliations; has threatened and warned its em-

ployees to refrain from assisting, becoming members of or remaining members of, the union; has kept under surveillance the meeting places, meetings and activities of the union or the concerted activities of its employees for the purpose of self-organization or improvement of working conditions; and more particularly, the respondent has done the following:

(a) On or about April 11, 1953, M. A. Quisenberry, as agent of Respondent, stated substantially as follows: "Are you union?"; to which the employee replied, "Yes", following which Quisenberry stated substantially: "The reason I asked is because I want non-union men, the old man would never stand for it, it would get me in trouble and then I would have to fire you, you must drop your union book, a withdrawal card will not mean anything—it won't matter either way". Upon obtaining a promise of the Respondent's employee to obtain his withdrawal card, Quisenberry stated substantially: "If you promise not to instigate any union activities, you can have a job as long as you want it because I don't want anything to do with the union, the union creates too much trouble for the company."

(b) On or about May 30, 1953, Quisenberry, as agent of Respondent, stated substantially to one of Respondent's employees as follows: "Richins is a good fellow, but I can't use him because I don't want anything to do with the union, the union creates too much trouble for the company."

(c) On or about May 30, 1953, Quisenberry, as

agent of Respondent, stated substantially to one of Respondent's employees as follows: "Richins is a good fellow but I can't use him because I'm afraid he will go all union."

(d) On or about May 24, 1953, Quisenberry, as agent of Respondent, stated substantially to one of Respondent's employees as follows: "When I hired Cox, I asked him if he was a union man and had a union book, and Cox said, 'No', so I hired Cox on the strength of that. Later on I found out Cox had belonged to the union all the time. It made me mad that I loaned him \$20.00 when he told me he did not have a book, and I have no use for a guy like that so I let him go."

(e) On or about May 15, 1953, Quisenberry, as agent of Respondent, directed one of Respondent's employees substantially as follows: "You are to have no part in the union, the old man has me on the carpet for hiring a union man, the old man will park all of those trucks, drop back from 6c to $5\frac{1}{2}$ c per mile and move all fuel by rail before he will go with the union. As I find out who the union men are, I'll let them go on the spot."

(f) On or about May 22, 1953, Quisenberry, as agent of Respondent, inquired substantially of three of Respondent's employees as follows: "How are you going to vote at the union election?"

(g) On or about March 2, 1953, M. A. Quisenberry, as agent of Respondent, inquired of one of Respondent's employees substantially as follows: "Are you keeping your union book up?"

(h) On or about May 15, 1953, M. A. Quisen-

berry, as agent of Respondent, stated substantially to one of Respondent's employees as follows: "I had a letter from the local union in El Paso and Tucson, and I threw it in the waste basket. I am definitely not going union."

(i) On or about April 14, 1953, M. A. Quisenberry, as agent of Respondent, inquired of one of Respondent's employees substantially as follows: "Are you in the union? We don't want anything to do with the union", and upon being informed by Respondent's employee that said employee's membership had gone delinquent in 1948 stated substantially that "it would be all right so long as Respondent employee was not in the union." Quisenberry further inquired substantially: "Is Cox in the Union?"

(j) On numerous occasions between the dates of April 15 and June 30, all in 1953, M. A. Quisenberry, as agent of Respondent, inquired of one of Respondent's employees substantially as follows: "Are you a member of the Union?"

(k) On or about April 25, 1953, M. A. Quisenberry, as agent of Respondent, inquired of one of Respondent's employees substantially as follows: "Are you in the union?"

(l) On or about May 15, 1953, M. A. Quisenberry, as agent of Respondent, stated substantially to one of Respondent's employees as follows: "I definitely do not want any union drivers, and I am going to get rid of all of them who are union members. Rather than come down and talk to the union about a contract, I will move all of my trucks to

El Paso and that is what I intend to do, I am going to get rid of anybody who is paid up in the union and hire all non-union drivers, and if necessary to get drivers who are non-union I will teach men how to drive rather than use union drivers. You will have to drop your union book to work for me."

(m) On or about April 1, 1953, M. A. Quisenberry, as agent of Respondent, inquired of one of Respondent's employees substantially as follows: "Do you belong to the union?"; upon being informed by Respondent's employee that the employee had his withdrawal card, Quisenberry further stated substantially, "I think that will be all right. I am looking for non-union drivers and making sure that I get a non-union crew. In the event the drivers go union, the old man would shut the operation down."

(n) On or about May 22, 1953, M. A. Quisenberry, as agent of Respondent, inquired of one of Respondent's employees substantially as follows: "How are you going to vote in the event there is a union election? If you fellows vote union, you will vote yourself out of a job."

(o) On or about April 13, 1953, M. A. Quisenberry, as agent of Respondent, inquired of an applicant for employment with Respondent substantially as follows: "Are you a member of the union. Is Johnson a member of the union?"; and stated further substantially: "I don't want any union men, and this isn't going to be a union job. If you be-

come an employee of this company, you will have to quit paying dues and drop your card."

(p) On or about May 25, 1953, M. A. Quisenberry, as agent of Respondent, inquired of an applicant for employment with Respondent company substantially as follows: "Do you belong to a labor organization? If you do, put the information on our application blank."

9. By the acts described above in paragraphs 5 and 6, for the reasons set forth above in paragraph 7, respondent did discriminate, and is discriminating in regard to the hire or tenure or terms or conditions of employment of the employees named above in paragraph 5, and did thereby engage in and is thereby engaging in an unfair labor practice within the meaning of section 8 (a), subsection (3), of the Act.

10. By the acts described above in paragraphs 5, 6, and 8, and by each of said acts, respondent did interfere with, restrain and coerce and is interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in section 7 of the Act, and did thereby engage in and is thereby engaging in an unfair labor practice within the meaning of section 8 (a), subsection (1), of the Act.

11. The activities of respondent, described above in paragraphs 5, 6, and 8, occurring in connection with the operations of respondent, described above in paragraphs 1 and 2 have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor

disputes burdening and obstructing commerce and the free flow of commerce.

12. The acts of respondent, described above, constitute unfair labor practices affecting commerce within the meaning of section 8 (a), subsections (1), (3) and section 2, subsections (6) and (7), of the Act.

Wherefore, the General Counsel of the National Labor Relations Board has caused this complaint to be signed and issued by the Regional Director for the Sixteenth Region, on the 17th day of September, 1953 against Texas Independent Oil Company, Inc., respondent herein.

[Seal] /s/ EDWIN A. ELLIOTT,
Regional Director, National Labor Relations Board,
Sixteenth Region.

GENERAL COUNSEL'S EXHIBIT No. 1-L

[Title of Board and Cause.]

ANSWER

Comes Now Texas Independent Oil Company, Inc., and in answer to the complaint filed herein, and pursuant to the rules and regulations of the National Labor Relations Board, hereby admit, deny and allege as follows in answer to the complaint:

1. Answering paragraph 1, respondent admits the allegations therein contained.

2. Answering paragraph 2, respondent admits the allegations therein contained, except that portion which alleges that said twelve-month period ending

June 30, 1953, is representative of all times material hereto and, in this connection, alleges that prior to March, 1953, this respondent had secured all of its gasoline from the State of California but, due to a shortage of gasoline on the Pacific Coast and for other reasons, the operation was changed to El Paso, Texas, and gasoline was delivered from the Standard Oil Refinery at El Paso and transported to Phoenix; the operation in its inception being temporary for the reason that price changes and a surplus of gasoline on the Pacific Coast would mean that gasoline would again be transported from Los Angeles to Arizona points rather than from El Paso to Arizona points.

3. Answering paragraphs 3 and 4, this respondent admits the allegations therein contained.

4. Respondent admits the allegations contained in paragraph 5.

5. Answering paragraphs 6 and 7, this respondent denies all and singular the allegations therein contained and in particular that it failed and refused to reinstate the employees for the reason they joined or assisted in the Union or engaged in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

6. Answering paragraph 8, this respondent denies all and singular the allegations therein contained and, with particularity, the first paragraph and subparagraphs a, b, c, d, e, f, g, h, i, j, k, l, m, n, o, p.

7. Answering paragraphs 9, 10, 11 and 12, this

respondent denies all and singular the allegations therein contained.

8. Further answering, this respondent alleges that John E. Cox was dismissed because of a direct violation of a clear company instruction regarding speeding on the highways. At the time of employment, Mr. Cox, as well as all other company drivers, was informed that the company speed limit was fifty-five miles per hour. The company has installed tachograph charts on all equipment, which charts clearly show the speed at which the equipment is being driven and Mr. Cox's dismissal came the morning after his equipment arrived at Tucson containing a chart showing extended driving period of sixty miles per hour.

9. Further answering, this respondent states the cause of dismissal of William J. Johnson was because the employee failed to show up for work until two hours after being scheduled to take out company equipment on a run. The said William J. Johnson had been with the company only ten days and good business practice will not permit retaining employees who cannot show up for schedules on time.

10. Further answering, this respondent alleges that the reason for the dismissal of E. W. Richins, Jr., was occasioned by the fact that he tore up a transmission. Tearing up a transmission, as a general rule, means that the employee does not properly shift gears at the proper speed or does something that would not otherwise be generally done if they were efficiently operating the equipment.

Any other employee would be similarly dismissed.

11. Further answering, this respondent alleges that Harry Almada was dismissed solely for the reason that he failed to "bump tires", a company rule being that said tires were to be bumped every seventy or eighty miles, the places being at the end and beginning of each run and also at Deming, New Mexico, and Willcox, Arizona; that said Harry Almada failed to bump the tires at Deming, New Mexico, and as a result thereof, twenty miles beyond, a tire was melted and torn up.

12. Further answering, this respondent alleges that the operation between El Paso, Texas, and Arizona points is a new operation and respondent was put to hiring a substantial number of employees within a short time; that, as a result thereof, all of the qualifications required of a driver for this type of equipment could not be checked and it was to be expected, therefore, that every employee hired would not have a permanent job; that no employee was fired or dismissed because of any Union activity.

Wherefore, respondent prays that this complaint be dismissed and that no unfair labor practices be attributed to this respondent.

TEXAS INDEPENDENT OIL
COMPANY,

/s/ By M. A. QUISENBERRY,
LANGMADE & SULLIVAN,

/s/ By S. W. LANGMADE,
Attorneys for Respondent

Duly Verified.

GENERAL COUNSEL'S EXHIBIT No. 3

To All Line Drivers of Texas Independent Oil Co.:

No. 1—All charts must be signed by both drivers and dated with the truck number, including starting point and destination. This is a must for your own protection as well as that of the Company.

No. 2—Top speed is 50 miles per hour. This means all drivers on all trucks.

No. 3—All drivers must have a physical examination and application papers in the office file.

No. 4—No driver shall hook a Company piece of equipment to a stalled truck or a stuck truck without authority from this office.

No. 5—Every driver is responsible for his own trip card. If your check is short, it is probably due to the fact that your trip card was not made out correctly.

No. 6—No test runs on any Company equipment without orders from this office.

No. 7—There is being an unwarranted amount of time wasted on the road and changing drivers in Tucson. When these trucks are not rolling, the Company is not making any money and neither is the driver. Round trip from Tucson to El Paso should be made in 18 hours. The trip from Tucson to Phoenix in 7 hours. These trucks must make the round trip Phoenix to El Paso and return in 25 hours. At the rate of 50 miles per hour this leaves plenty

of time for loading, unloading, tire checks, and coffee stops.

No. 8—Drivers will bump tires at least every 80 miles and check transmission and hubs for heat.

No. 9—El Paso-Tucson drivers are responsible for the condition of the equipment. This includes mechanical, cleanliness and looks.

No. 10—All traffic tickets drivers receive on the road for traffic violations will be paid for by the drivers themselves unless the violation is due to faulty equipment.

No. 11—Tampering with tachograph clocks on trucks will be grounds for immediate dismissal.

No. 12—Drivers are not to work on the motors, pumps or thermostats.

No. 13—For no reason shall a driver let anyone else ride on the truck with him unless it is a company employee or a student authorized by this office.

No. 14—On all phone calls, date must be listed, who called, where to and how much and signed by the driver.

No. 15—No money shall be advanced to drivers on pay checks nor out of petty cash. Drivers will have to figure out their own financial troubles.

/s/ M. A. QUISENBERRY

[Title of Board and Cause.]

INTERMEDIATE REPORT AND RECOMMENDED ORDER

Allen P. Schoolfield, Esq., for the General Counsel; Mr. Howard D. Grant, of Tucson, Ariz., for the Charging Union; Stephen W. Langmade, Esq., of Phoenix, Ariz., for the Respondent.

Before: David F. Doyle, Trial Examiner.

Statement of the Case

This proceeding, brought under Section 10 (b) of the National Labor Relations Act, as amended, herein called the Act, was heard at Tucson, Arizona, on October 6 and 7, 1953, pursuant to due notice to all parties. The complaint, dated September 17, 1953, issued by the General Counsel of the National Labor Relations Board and duly served on the Respondent, was based on charges duly filed and amended by the above named Union. It alleged in substance that the Respondent, from on or about April 11, 1953, (1) had interrogated its employees concerning their union affiliations; had coerced its employees against joining or maintaining membership in the Union and had kept under surveillance the meetings of the Union; and (2), on specific dates alleged in the complaint, had discharged certain employees for engaging in union or concerted activities, thereby engaging in unfair labor practices within the meaning of Section 8 (a) (1) and (3) and Sections 2 (6) and (7) of the Act.

Respondent in its duly filed answer, admitted the

jurisdictional allegations of the complaint, and that the Union was a labor organization within the meaning of Section 2 (5) of the Act, but denied the commission of any unfair labor practices and alleged affirmatively that it had discharged the employees named in the complaint for cause.

All parties were represented at the hearing, were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing on the issues, to argue the issues orally upon the record, and to file briefs and proposed findings. Oral argument was presented by the General Counsel, and the Respondent filed a brief.

Upon the entire record in the case and from my observation of the witnesses, I make the following:

Findings of Fact

I. The business of the Respondent.

Upon the pleadings and a stipulation of the parties, I find that the Respondent is a corporation duly organized and existing under the laws of the State of Arizona. It has its principal office and place of business in the city of Phoenix, Arizona, and has been at all times herein mentioned continuously engaged in the transportation and sale of gasoline and petroleum products. In the course and conduct of its business during the 12-month period ending June 30, 1953, the Respondent purchased equipment consisting of trucks, tractors, trailers, and related items valued in excess of \$75,000, of which more than 85 percent was shipped in interstate commerce from points outside the State of

Arizona to Respondent's place of business at Phoenix, Arizona. During the same period, Respondent sold and transported gasoline and petroleum products, valued in excess of \$1,000,000, of which more than 95 per cent was shipped in interstate commerce from points outside the State of Arizona to points located in the State of Arizona. It is conceded, and I find, that Respondent is engaged in commerce within the meaning of the Act.

II. The labor organization involved

On the pleadings, I find that the Union is a labor organization within the meaning of Section 2 (5) of the Act.

III. The unfair labor practices

A. Undisputed facts.

The Respondent has been engaged for many years as a distributor of gasoline and petroleum products in the State of Arizona. In April 1953 the Respondent changed materially its transportation operations, by discontinuing the importation of petroleum products from California refineries by railroad or contract carriers, and by setting up its own trucking system to bring its supply of gasoline into Arizona from refineries located in the State of Texas, principally at El Paso. For this purpose a trucking operation was instituted between El Paso, Texas, and Phoenix, Arizona, a distance of 427 miles. A division point was established at Lordsburg, Arizona, which is 230 miles distant from Phoenix. By the operation, loaded trucks were driven by drivers from El Paso to Lordsburg. At

that point the driver of the loaded truck transferred it into possession of a driver who drove the remaining distance to Phoenix. The driver who had driven the loaded truck from El Paso then drove an empty truck back to El Paso. By this system drivers drove from El Paso and from Lordsburg with loaded trucks, and returned with empty trucks to El Paso or Lordsburg. The first operations were instituted on approximately April 15, 1953, with a single truck and driver, but the trucks and drivers were rapidly increased until at the time of the hearing, six months after the institution of the operations, approximately 26 truck drivers were employed.

M. A. Quisenberry was employed by the Company to set up the operation and to employ the men necessary to institute and maintain operations between Phoenix, Lordsburg, and El Paso. Certain features of Quisenberry's conduct in this regard are called into question by the complaint.

The Issues

At the hearing many employees testified credibly that at the time they were hired by Quisenberry they were interrogated by him as to their membership in the Union, and that they were told that the operation was to be a nonunion job, and that they were to refrain from union activities. Quisenberry admitted that he had interrogated the prospective employees about their past and present union affiliations, and had told them that he did not want the job organized as a union job until the operation

of the truck route had become firmly established, and that he had urged the employees to refrain from union activities until that time. Consequently there is not much dispute as to much of Quisenberry's conduct. His conduct found to constitute specific violations of Section 8 (a) (1) based on this testimony, will be set forth later herein.

The vigorously contested point at issue between the parties is contained in the allegation that the Respondent by Quisenberry discriminatorily discharged the following men on the various dates hereafter set forth, for engaging in union activities in violation of Section 8 (a) (1) and (3) of the Act:

Kenneth Van Horn: Discharged May 12, 1953; rehired approximately September 28, 1953.¹

John Cox: May 15.

William J. Johnson: May 15.

E. W. Richins, Jr.: May 25.

Harry Almada: June 3.

Sidney Bailey: July 6.

Robert Dayton: Laid off for two full days beginning September 8.

The General Counsel and the Union contend that each of these men was discharged for a discriminatory reason, while the Respondent contends that each of the men was discharged for cause.

It is worthy of note, that the complaint of the General Counsel names as a discriminatee every truck driver discharged by the Respondent from

¹ All dates in this report are in the year 1953, unless shown otherwise.

the date of the institution of the trucking operation, until the date of the hearing, with one exception. That driver, not named in the complaint, had an accident which resulted in the destruction of his truck by fire. That particular driver is not involved in this proceeding. However, all other men discharged by the Company are alleged to have been the objects of discrimination, while the Respondent contends that all of these men, were discharged for cause.

The General Counsel contends that upon the evidence as a whole, it is clear, that Quisenberry's antipathy to the Union, motivated his discharge of the specified employees. However, the Respondent argues that, admitting that Quisenberry committed certain violations of the Act in his hiring procedure, the specified employees were discharged for inefficiency, or grave breaches of Company rules, and that Quisenberry's illegal conduct, or any inference based thereon, does not outweigh its proffered proof that the men were discharged for cause.

B. The first group of discharges.

1. The discharge of Van Horn.

Van Horn was employed on May 2, and discharged on May 12. At the time Quisenberry interviewed Van Horn for employment, he asked Van Horn if he was a member of the Union. Van Horn said that he was a member of the Union and that he was on a withdrawal card from the Long Beach, California, local. Van Horn was hired. His employment was uneventful until May 12. On that date he

was at the 84 Truck Stop at Tucson with Quisenberry waiting for his scheduled truck. When the truck came in he stood up to go, but Quisenberry told him to wait. Quisenberry then asked Van Horn with whom he had talked while in Phoenix on the previous day. Quisenberry then explained that Van Horn, while unloading gasoline at the retail gasoline station known as Blakely No. 1, had talked to an old man. Quisenberry said that as soon as Van Horn had left the gasoline station, the old man had proceeded directly to "Old Man Steele" (the Vice President of the Respondent) and told him that Van Horn was instigating the Union among the drivers, and in consequence Quisenberry had been given orders to discharge Van Horn. Van Horn denied to Quisenberry that he had said anything out of the way to the old man. He explained that he had passed the time of day with the old man, who had inquired about several of the drivers, and then had inquired how the drivers were getting on with the union deal. Van Horn had told the old man that there hadn't been too much talk about the Union, except that some union application blanks had been passed among the drivers. When the old man had asked Van Horn for his estimate of whether the job would be organized, Van Horn had replied that perhaps some day it would be organized. Van Horn said that constituted the entire conversation, and that there was nothing to it. Van Horn told Quisenberry that the latter was giving him a "chicken deal," that he had not said anything out of the way to the old man, and that he

had never tried to instigate the Union among the drivers. Despite Van Horn's explanation and protest Quisenberry gave him his severance check, which was already made out. Quisenberry then drove Van Horn to the motel where the latter was living. On the way to that place, Van Horn again told Quisenberry that he thought his conduct was "chicken." Quisenberry admitted that it was a "chicken deal" that he was giving Van Horn, but stated that there was nothing he could do about it, since "Old Man Steele" had told him to get rid of the man who was instigating the Union.

On or about September 25, 1953, Van Horn phoned Quisenberry about a job. He told Quisenberry that he needed a job very badly and Quisenberry told him that he needed some drivers in El Paso. Van Horn drove to Phoenix and talked to Quisenberry at the plant, with the result that he went to work on September 28. However, before Van Horn went to work, Quisenberry told him that he was "not going to tell anybody how to vote but he still did not want the Union." Van Horn asked him, if he returned to work and went nonunion, if he would be given his seniority as of May 12. Quisenberry said that he would.

As to the discharge of Van Horn, Quisenberry testified that on May 11, Van Horn was scheduled to take out a truck in the early morning hours. He did not show up at the Truck Stop on time, so Quisenberry dispatched another driver. Van Horn had been late in reporting to take his trucks several times prior to that date. When Van Horn finally

appeared in the afternoon of May 11, he dispatched him on another truck, but on the following morning when he saw Van Horn he told him that he was discharged because he had not shown up to take his trucks out on time.

On direct examination, Quisenberry admitted that he had a conversation with Van Horn relative to his talking to an old man at Blakely No. 1, at the time of Van Horn's discharge. Quisenberry testified that he told Van Horn only that he would rather than the employees did not talk about various aspects of the job to other employees of the Company, and that the conversation with the old man had no bearing upon his action in discharging Van Horn. He testified that he discharged Van Horn for appearing late for work. Van Horn in his turn denied that he was ever late to take out a scheduled truck.

2. The discharge of Cox.

John Cox testified that he began work on April 15 and was discharged on May 15. On or about April 1, in the company of Jensen, another truck driver later employed by the Company, Cox went to Quisenberry's house to apply for a job. The three men talked about trucking operations, the scheduled runs, and the rate of pay. In the course of this conversation Quisenberry asked the men if they belonged to the Union. Cox said that he did not, and Jensen explained that they had belonged to the Union, but both had become delinquent in the payment of dues in 1947. Both men were hired and shortly thereafter went to work. On or about May

1 Cox went to Quisenberry's house to get his load papers. Quisenberry asked him if he was still keeping his Union book paid up. Cox said that he was. A silence then ensued. After a moment Quisenberry asked him how he would vote if an election came up. Cox said that he was undecided.

On or about May 11 or 12, Cox had another conversation with Quisenberry at the 84 Truck Stop in Tucson. On that occasion Quisenberry asked him how he would vote if an election came up, and Cox again told him that he was undecided. On May 15 Cox reported to Quisenberry by phone. Quisenberry told Cox that he wanted to talk to him. When the men met, Quisenberry told Cox that he had received a letter from Tucson and El Paso unions and had thrown it in the wastebasket. He said that he was not "going union." Quisenberry asked how Cox was going to vote if an election came up, and the witness again said that he was undecided. Quisenberry then said that inasmuch as Cox was undecided, and kept his book paid up, maybe he had better get out and get a union job. Cox said O.K. Quisenberry told Cox to figure up his trip sheet, and that he would have his check ready for him on Monday.

According to Cox, in this conversation Quisenberry said that he knew he couldn't fire a man for joining a union but he would find a reason and make it stick. Cox asked what kind of a reason he was going to use on him, and Quisenberry replied that he was going to use the tachograph chart which showed that Cox had been running at 58 miles an hour, in violation of the Company speed limit of 55

miles an hour. Explaining this conversation, Cox testified that on his second trip in Truck 7 he had told Quisenberry that when the truck motor was making 1700 r.p.m. its speed was well below the speed limit. He asked Quisenberry's permission to run the motor at about 1900 r.p.m. and Quisenberry had given him permission to do so.

On the following morning Cox went to get his check. According to his testimony, when he saw Quisenberry, he said "What in the hell did you fire me for, Quisenberry? I know it wasn't because I was running 58 miles an hour. The only thing I can figure out is because I was union." Quisenberry then admitted that was the reason he had been discharged. At that point the telephone rang and the subject was dropped.

Cox also testified that about 10 days after the last-mentioned conversation he and William Johnson, another allegedly discharged employee, saw Quisenberry at the 84 Truck Shop. They conversed on this occasion, and Quisenberry said he wished that the union situation would be resolved one way or another, that he was tired of the in-between situation. Quisenberry said to the men that if the job went union, he wanted Cox and Johnson back, because he could always depend on them.

On cross-examination Cox admitted that in applying for a job he lied to Quisenberry about the fact that he was a member in good standing with the Union. He admitted that he was a fully paid-up member at all times, but explained that he had lied because he had heard rumors that the job was a

nonunion job. Cox denied that he was ever warned about exceeding the Company speed limit of 55 miles an hour.

Quisenberry testified that Cox was discharged for speeding. Quisenberry readily admitted that on several occasions he had told the better drivers on the job, such as Turner, Cox, Almada, Johnson, and Dayton, that they were to exceed the speed limit in order to get to the refinery before it closed. But he explained that he didn't mean by those specific orders to permit the men to run in excess of 55 miles an hour whenever they wished. He learned from the tachograph charts that Cox on three or four occasions had driven for long distances at sustained speeds of 60 and 65 miles an hour. That was a different situation than a driver occasionally going 60 miles an hour in order to pass another vehicle on the road. Quisenberry stated that he had spoken to Cox about speeding on May 12, telling him that he didn't want the trucks driven at speeds over 55 miles per hour unless he gave specific orders. On May 15 he called Cox into his office in his home and showed him his tachograph chart and said, "Johnny, we can't go for this kind of stuff. We'll have to let you go."

Harry Almada, another discharged employee, in his testimony also shed some light on the Cox discharge. Almada testified that a few days after Cox was discharged Quisenberry had a conversation with Bill Richins, another employee, later discharged, and himself in front of Almada's house. On this occasion Quisenberry said that when Cox applied

for a job he had asked him if he was in the Union and that Cox had replied in the negative. On that assurance, Quisenberry had given Cox a job. A few days later Cox borrowed \$20 from Quisenberry. And then a few days later, Quisenberry learned that Cox carried a fully paid-up book in the Union. He told the men that made him so mad, that he let Cox go. Quisenberry also told the men that he had fired Cox because he felt Cox would cause Quisenberry trouble later on.

3. The discharge of Johnson.

William Johnson was hired by Quisenberry on or about April 28, and his employment was terminated on May 15. Johnson testified that he was taken to Quisenberry by a friend who told him of the possibility of a job with the Company. Quisenberry asked Johnson about his prior driving experience and then asked him if he had a union book. Johnson said that he had a paid-up book. Despite this, Quisenberry then said that Truck No. 11 was coming into Phoenix in about three days and that he would put Johnson on that truck. Johnson stated that thereafter Quisenberry did not talk about the Union although the two men conversed quite frequently.

On or about May 15 Johnson came in on a run from Phoenix and talked to Quisenberry at the 66 Truck Stop. In the course of the conversation, Quisenberry talked at some length about the Union and said that he might transfer the operation to El Paso. He said he was not going to have union drivers driving for him. Johnson replied that he

was a union man and always would be, and that ended the conversation. Johnson testified that from this conversation he concluded that Quisenberry had given him his choice of giving up either his union membership or his job. Thereafter, he did not go back to work for the Company.

On cross-examination this witness reluctantly admitted that on the morning of his termination, he had arrived at the Truck Stop, to take out his truck, about 15 minutes after the truck had left with another driver. He admitted that he was late for his scheduled run. Johnson also admitted that at no time in the conversation on this morning had Quisenberry told him that he was discharged or laid off.

On recross-examination, Johnson again testified that between the time of his hiring and his final day on the job Quisenberry had not talked to him about the Union, but later in his testimony he said that it was put to him so many times that he would have to give up his book, to work for the Company, that he concluded he was discharged.

Quisenberry testified that Johnson was employed by the Company for approximately three weeks, ending his employment on May 15, 1953. Quisenberry said that Johnson was not discharged, that Johnson simply did not come back to work. Quisenberry stated that when Johnson was hired on approximately April 25 Quisenberry told him that he would rather have the job stay nonunion until he got all of the trucks in operation and had the operations running smoothly. Johnson said that would be

all right with him, and that was the extent of the conversation as to unions on the day that he was hired. Quisenberry testified that on the day Johnson's employment ended, that Johnson did not appear for his scheduled run so Quisenberry after some delay procured another driver and dispatched him on the run. When Johnson showed up some time after the truck had left, the men sat around and conversation turned to the Union. Quisenberry told Johnson that he wanted the men to wait until he had the operation lined up and started before he engaged in negotiations with the Union. Johnson said that he was a union man and always would be. Quisenberry replied that he didn't blame him a bit, that he too had belonged to the Teamsters Union in the past. After that conversation, Quisenberry stated, Johnson simply did not show up for work any more.

Johnson also testified that he was with Cox in the truck stop when Quisenberry said to them that he was tired of the in-between situation with the Union, and that in the event the job went union, he would like Cox and Johnson back.

C. Union organizational activities; the filing of the representation petition and the filing of the original charge herein.

It is noteworthy that up to that point in time, May 15, there appears to have been no organizational activity by officials of the Union. The only reference to any organizational activity was by Van Horn who mentioned that application blanks for the Union were passed among the men. Jensen, an-

other employee, later testified that he obtained signatures of employees to approximately 11 union application blanks, 7 or 8 from men at Tucson, and the remainder from men at El Paso. Also approximately two of the employees mentioned that they had signed application blanks of the Union. However, this activity appears to have been of a clandestine nature and to have occurred an appreciable time after May 15. There appears to have been no open organizational activity by anyone prior to May 15 which might have contributed to Quisenberry's fears of immediate unionization.

However, on May 15, 1953, the Union filed a representation petition with the Board, seeking certification as bargaining agent for the employees in the trucking operation, and on May 16, 1953, the Union also filed the original charge in this case, alleging that Cox and Johnson had been discriminatorily discharged. Copies of both documents were served on the Company. Further discharges occurred.

D. Second group of discharges.

4. The discharge of Richins.

E. W. Richins, Jr., began his employment on April 28 and was discharged by Quisenberry on May 25. Richins testified that just prior to his employment he called Quisenberry on the phone and asked him for a job. In the telephone conversation, Quisenberry inquired about Richins' union standing, and Richins told him he had a withdrawal card since 1946. Later the men met at a drugstore at Lordsburg and discussed aspects of the job. Richins asked Quisenberry why he was interested in his

union connection. Quisenberry replied that he was looking for a nonunion crew, but that Richins had been inactive in the Union so long, that he felt he would not have to worry about Richins, and he agreed to give Richins the next truck into Lordsburg. A few days later Richins heard that Quisenberry had promised the job to some other people so Richins went into Tucson to ask Quisenberry about it. Quisenberry said that he had three trucks that would start in the very near future and that Richins would get the next truck and not to worry about it. Richins said that from that day until a few days before his discharge he had no conversation with Quisenberry about his union affiliation.

On that date, May 22, he was in the company of employee Almada on the street in front of Almada's house when they had a conversation with Quisenberry. Richins testified that in this conversation Quisenberry said that he knew he shouldn't ask them how they were going to vote in the election, but that he wanted to know. Richins did not know what to say. He had a withdrawal card from the Union but did not want to jeopardize it in any way, and at the same time he didn't want to jeopardize his job. So he equivocated; he told Quisenberry that he would not "Cut off my nose to spite my face." Quisenberry turned to Almada, and was about to ask Almada how he would vote, when he checked himself and said that he didn't have to ask Harry; he knew what the answer would be. In answer to a leading question put by the General Counsel, Richins testified that on numerous occasions Quisen-

berry told him that if the men voted for the Union they would vote themselves out of a job.²

Richins testified that on May 25 he went to the Dixie Drive Cafe on the east side of Lordsburg preparatory to taking his truck on its run. He had no phone at home, and there was no other way of the Company communicating with him, so he was in the practice of just being where the truck would be, at the appointed time. When he arrived at the Dixie Drive Cafe, three trucks and three drivers were there. One of the drivers asked him which truck he was going to take. Richins said, "It looks like I am not going to take." Then Quisenberry, who was present, told him that "They had put the pressure on him in Phoenix" and he had to let Richins go. When asked what the witness understood by the phrase, "They had put the pressure on him in Phoenix," the witness said that he "assumed" that it was probably his union connections or something of that nature.

However, Richins stated that at this time Quisenberry told him that he was being discharged because he had had transmission failure in his truck. When asked when he had the transmission failure, the witness answered on the 23d, and then corrected himself, saying it was about two weeks before the date of his discharge.³

The witness also testified that in early June, after his discharge he ran into Quisenberry who said that

² Tr. page 76.

³ Tr. page 77.

he had heard that Richins had filed charges against him with the National Labor Relations Board. Richins said that he didn't know that he had gone that far, but admitted that he had filed an affidavit with Bill Stratton, a union official, stating what took place. He said that on this occasion Quisenberry wanted him to withdraw the charges, and when the witness said that he would not, Quisenberry said that in the event the Union was able to put him back to work, Quisenberry would find means of getting rid of him; if nothing else, he would starve him to death by holding back on his runs. Also Quisenberry said that when men were discharged he put on their personnel record whether they were suitable for rehire or not, and in his case he had placed Richins in the employable category until Richins had filed charges with the Board against him. Then he had placed him on the ineligible list. Also Quisenberry on this occasion told him if he dropped the charges he could move to El Paso and go to work.

On cross-examination, the witness admitted that, while he had driven heavy equipment before being employed by the Company, this was his first diesel experience. The witness also said that when the transmission failed on the truck it was patched up on the roadside near Lordsburg, and then driven to Phoenix to the repair shop of the Company. Richins testified that gears have to be shifted when the motor is going at the proper number of revolutions. If gears are shifted without the motor being at the proper speed, it is destructive of the transmission.

Changing the gears when the motor is not running at the proper speed is called "jamming" the gears in place.

On cross-examination, when pressed as to whether Quisenberry had actually told him that because he had filed charges he would never be put back to work, the witness replied that he "assumed" that if he withdrew the charges that he could go back to work and there would be no friction between them, but then testified that Quisenberry said there would be friction if the Union forced him to put Richins back to work. When asked directly by the Trial Examiner if Quisenberry ever said to him that "because he had filed charges with the Board the Company would not reemploy him," the witness replied in the negative. The witness also stated that after he had the transmission trouble he made two or three more runs in the same truck. It had been repaired after two or three days. The witness also testified that the truck was in need of repair all the time that he drove it. He insisted that he experienced trouble with the transmission only once, and that after it was repaired at the shop at Phoenix, he experienced no further trouble with it.

Harry Almada, previously referred to, also testified in regard to the discharge of Richins. He stated that a short time after Richins was fired Almada had a conversation with Quisenberry and another employee named Beeson at the Dixie Truck Stop. On that occasion Quisenberry said that Bill Richins was a good fellow and he hated to let him go, but he was too thick with his cousin, Art Richins, who

was poking union ideas into Bill's head, and that Bill Richins would vote against Quisenberry at the election, so Quisenberry had to let him go. On a second occasion, a few days later at Almada's house, Quisenberry repeated the statement.

As to Richins' discharge, Quisenberry testified that when Richins' truck, No. 11, was put in service on the route it had a transmission with a rattling fifth gear. It did not jump out of gear but it made a noise, so the Company installed a new fifth gear. At the time the new fifth gear was installed, Quisenberry saw the transmission when it was taken apart at the shop, and he noted that all other gears were in good shape. Later when the mechanic brought the truck back after the patch-up job at Lordsburg and took it apart, Quisenberry examined it, and saw that every gear in it, starting from the first gear upward, had the teeth on the edges of gears rounded off, showing that somebody had been jamming the truck into gear. However, the cause of the breakdown at Lordsburg had been that the fifth gear had broken and fallen off, blocking the other gears. Quisenberry stated that the rounding of the gears could not have happened in any other way or at any other time because he had seen the gears when they were out of the truck on the prior occasion. This time an entirely new transmission was put in the truck and it was given back to Richins, who was still on the job. Richins made about three trips in the truck and the fifth gear started to rattle again and jump out of fifth gear. Richins couldn't keep it in fifth gear. Quisenberry believed Richins was respon-

sible for the damage to the transmission due to his lack of experience, so he fired him. Quisenberry had the truck taken to Phoenix and when the gears were taken out of the truck he again inspected them. The gears which had been installed as new some few weeks prior were in the same shape that the old gears were in when they were removed. The corners of the gears were rounded off, showing again that somebody had been jamming the truck into gear. Quisenberry testified with some vehemence that he would fire his brother if he handled a transmission that way.

Quisenberry explained the manner of Richins' firing at the Dixie Truck Stop. He said that Richins had no phone, and the only way he could contact Richins by phone was through Richins' sister-in-law. On May 25 he had tried to call Richins through the sister-in-law but had been unable to reach him. He had already assigned another driver to take Richins' place. When he couldn't reach Richins by phone, he waited until he saw Richins at the Truck Stop. He said to Richins, "Bill, I am firing you because of that transmission." Richins said, "Well, I take it I am fired for union activities," and walked off.

As to his proficiency in shifting gears, Richins, in his testimony, said that he had been given a "test hop" by Bill Turner on one occasion and had a second "test hop" with Almada on another occasion. He had passed both these tests successfully. Employee Turner also testified that on his "test hop" Richins had shifted gears satisfactorily.

As to the hiring of Richins, Quisenberry in his testimony admitted that he had inquired about Richins' affiliation with the Union at the time of hire. He also admitted that he told Richins that the Company was paying 6 cents a mile wages, while the McNutt Oil Company in El Paso, which trucked gasoline into Arizona pursuant to a contract with the Union, paid only 5½ cents a mile. Quisenberry also admitted that he did speak to Richins about the way he would vote in the event an election was held. He admitted that he said to him on May 22, "Off the record, I really shouldn't ask you, but how will you vote if we have an election." Quisenberry denied that he told Richins or anybody else that the men were going to vote themselves out of a job.

5. The discharge of Almada.

Harry M. Almada was employed by the Company from April 13, 1953, until June 3, 1953. He testified that he first talked to Quisenberry in regard to a job on Saturday, April 11. Quisenberry came to Almada's home and asked him if he was looking for a job, stating that he was starting a new operation, trucking gasoline between Lordsburg and El Paso. Almada said that he wanted a job. Quisenberry asked him if he belonged to the Union and Almada told him that he had a union book and was in good standing. According to Almada, Quisenberry then said, "That lets you out because I am not hiring any union men. I am hiring all nonunion men because I don't want a union outfit." Quisenberry further explained that he didn't want any trouble with the Union or to be delayed by the Union, and

then suggested that Almada drop his book and withdraw from the Union. Almada agreed to do that, if Quisenberry would hire him. Quisenberry then said if Almada would promise not to instigate any union activities that Almada could have a job as long as he wanted it. With that understanding, Almada was hired.⁴

On April 13, about 7:30 a.m., Quisenberry called Almada and told him that he had a truck waiting for him. Almada went to the Dixie Truck Stop, where he met Quisenberry with the truck. Quisenberry said that he would "test hop" Almada by driving with him from Lordsburg to El Paso. The men rode from Lordsburg to El Paso and back. In the course of the ride, Quisenberry explained to Almada why he didn't want the Union on the job. He said that at one time he had belonged to the Union and that he was of an ambitious nature and that the Union had held him back. When he started working without the Union he had made progress. Quisenberry said that the job would be a good deal without the Union. In the course of the ride to El Paso and return, Quisenberry and Almada discussed the speed at which the trucks containing gasoline should be driven and both agreed that 55 miles per hour was a proper Company speed limit. They also discussed how often tires should be "bumped," a process by which all the dual tires on the truck are kicked or hit with a tool to make sure that they are all properly inflated. All equipment used by the Company had dual tires. This was a matter of im-

⁴ Almada and Turner were the first two drivers employed, both beginning work on April 13.

portance because in the event one of the dual tires went flat, the weight of the load would be taken by the remaining tire, but as the truck was driven, friction would generate heat which would ultimately burn up the flat tire. Both men agreed that the tires should be bumped at approximately 60-70 miles and Almada suggested that tires should be bumped at the beginning of each run and at Las Cruces and Deming. Quisenberry also told Almada that he was the only one who read the tachograph charts showing the speed of the trucks, and that on some occasions he might have to tell the men to disregard the charts. Almada stated that on several occasions in the early days of the operation the men were told by Quisenberry to disregard the charts and to get to the refinery at El Paso before it closed. This would entail exceeding the Company speed limit of 55 miles per hour.

Almada was an experienced truck driver and it is apparent that Quisenberry had a high regard for Almada's ability, for soon after the operations were commenced, he asked Almada to oversee the job at the Lordsburg end. At that time Quisenberry was making his Lordsburg headquarters at Almada's house and frequently discussed the operations with Almada. Almada refused to oversee the job because he felt that he might get in bad with the other drivers. However he recommended other drivers to Quisenberry, who hired the men. Among them were Bill Richins, Harry Payne, and Joe Delgado. Almada testified that he had a conversation with Quisenberry on or about May 25, 1953, at the Dixie Truck Shop in reference to the firing of

Richins. This conversation has been related previously, as has another conversation between Almada and Quisenberry in regard to Cox.

About May 15 Quisenberry called Almada at home and told him that he was on the spot; that the "Old Man", Horace Steele, the Company Vice-President at Phoenix, was mad at Quisenberry, and had told him to get rid of a certain man because he was union all the way through. Quisenberry said he had asked who the man was and Steele had said that it was Harry Almada in Lordsburg. Steel said that he wanted Almada fired. Quisenberry told Almada that he was "in a terrible spot." Quisenberry then told Almada that he would have to send his withdrawal card back to Fred Bone, the union representative, and tell him that he wanted no part of the Union. Almada said that he couldn't do that. Whereupon Quisenberry said that it was either that, or else. Almada said that he had kept his word with Quisenberry and hadn't caused any union activity. Quisenberry said that Fred Bone had told him that Almada was a staunch union supporter and that Almada was ready the minute he gave the word. Almada asked Quisenberry to give him time to call Bone in El Paso because Bone had given Almada his word of honor not to interfere in any way with the job, because Bone knew Almada needed the job very badly.

When Almada called Bone, the latter told him that he did not know Quisenberry, that he had never met the man, or talked to him. Almada called Quisenberry back and told him what Bone had said.

Quisenberry said that he had to do something to tie his men in on one side of the fence or the other. Almada again stated that he could not let go of his withdrawal card, that he would need it some of these days. Quisenberry said that it was either that, or else. Quisenberry said he was going to Phoenix and would talk to the "Old Man" and when he got back he would let Almada know one way or the other. He said that meanwhile, Almada was not to take his usual run. However when Almada's truck came in his "breaking partner" said he had everything fixed up and Almada was to take his regular run. This occurred around the middle of May. Almada continued working until the day he was discharged on June 3, 1953.

Almada testified that on June 2, about 11 p.m., he went to the Dixie Truck Stop at Lordsburg to fuel his truck. He had to wait while other trucks were serviced and he became worried that he couldn't make the schedule. When he left there he tried to make up lost time. Almada admitted on cross-examination that he had been given orders to "bump" his tires about every 60 miles and that tires were to be bumped at Deming and Las Cruces. He had reached a point between Deming and Las Cruces, about 15-17 miles west of Las Cruces, when he noticed that something was wrong. Almada stopped his truck and found that one of his tires was flat, and had started to burn. He went for his two fire extinguishers but found them dead. Two other trucks of the Company and another truck stopped and the men took the tire off the wheel. Almada left the

tire in the desert to cool and continued his run. He went to the refinery and on the way back he picked up the tire from the desert, and credled it back on the trailer so Quisenberry could see it. On his return to Lordsburg, Quisenberry called him to tell him that Quisenberry was going to El Paso, and wanted the men there. Almada told him that he would meet him there, and told Quisenberry that he had burned a tire on the road. Quisenberry said that he would examine the tire at Tucson. About midnight that night, June 3, Quisenberry called Almada. He said that he couldn't have the men burning tires up and down the road, and that George Wallsmith was going to take Almada's truck, that he had to let Almada go. Almada had no further words with Quisenberry.

On cross-examination Almada stated the facts about flat tires on dual-tired vehicles, about which there appears to be no dispute. He explained that when a tire is driven flat for an extended period of time, it smokes and smoulders until the vehicle is stopped, when the tire will often burst into flame. Almada stated that the tire would start to burn after it had rolled about 10 miles in the heat of the day or about 15 miles at night if the truck was driven fairly fast. He also agreed that if the truck was empty it would not catch fire for a longer distance. Almada stated that he bumped his tires at Lordsburg but not at Deming and that he was about 80 miles from Lordsburg when he noticed that the tire was smoking, and stopped. He also admitted that the tire was left on the side of the road because

it was smoking and too hot to be put on the spare tire rack.

Quisenberry testified that in hiring Almada he told him that he would rather that the job be non-union until he had all the trucks in operation and the lines set up. After all the trucks were in operation and the lines were set up, he had said on many occasions that he did not care whether the job was union or not. Quisenberry did not recall whether he had told Almada to get a withdrawal card or not. He said that he did tell Almada that he wanted a smooth operation and didn't want any bickering back and forth until he got the operation started. He also corroborated Almada as to the conversation relative to "bumping" on Almada's test hop. He had issued orders that the tires were to be bumped at the beginning of each run and at Deming and Las Cruces. The place where Almada's tire was taken off the truck was about 20 miles east of Deming, so Almada had driven about 80 miles from Lordsburg without bumping his tires. Quisenberry first saw the tire lying beside the road. When he examined the tire, it was burned up. From his experience, Quisenberry testified that to burn a tire that badly, while it was being driven at night, on an empty trailer, would require about 35 miles of flat driving. Quisenberry also stated that the cost of a diesel cab and trailer unit is approximately \$30,000. He also agreed with Almada that a tire which is driven some distance flat will break into flame when the vehicle is stopped, and added that it will also break into flame while rolling if it is driven a

long distance flat. Quisenberry saw the tire, and called Almada and discharged him. He called Almada before he made his next run and said, "Harry, I'm going to have to let you go because of that tire." Almada said, "I take it I am fired for union activities." He said, "No, Harry, you are fired because you burned up a tire and left it lay beside the road because it was so damn hot you couldn't get it back on the tire rack." Quisenberry stated that he employed everyone brought to him by Almada, that he thought a lot of Almada's judgment on the capabilities of drivers, and that the men recommended by Almada had been good men.

6. The discharge of Bailey.

Sidney W. Bailey was employed by the Company from May 25 until he was discharged on July 7. Bailey testified that at the time he was employed he was asked to fill out an application blank given to him by Quisenberry. One space on the application blank which asked for "Activities other than religious," he did not fill out. Quisenberry asked if he belonged to the Union. He told Quisenberry he had a Union book, but that his dues weren't paid to date. Quisenberry handed him back the application and told him to put the name of the Union in the blank space. He complied and gave it back to Quisenberry. Quisenberry then told Bailey that he did not want the Union in the operation. Bailey told Quisenberry that he belonged to the Union but would not cause any trouble. Bailey also testified that he did not engage in any union activities until after he was fired, when he signed a complaint

against the Company. Bailey was at El Paso when Quisenberry called him on the phone and told him he was fired. Bailey inquired as to the reason for his discharge and Quisenberry said that he was firing him for pulling the compression release on his truck. The witness told Quisenberry that was a poor excuse. Quisenberry then said, "Well, I have to have some sort, and it is the best one that I can think of."

On cross-examination, Bailey testified that he had pulled the compression release on every occasion that he killed the engine, that being the proper procedure to kill the engine. When cross-examined as to pulling the compression release when the truck was traveling at road speed, he stated that he had pulled the compression release on one occasion when a fuel line had broken on the motor, and the motor had run away, and on another occasion when the motor had "taken air." Bailey testified that it was not his practice to pull the compression release to clean out the motor, and that he had not talked to other drivers about it being proper to pull the compression release to clean the motor. Bailey denied that at the time he was fired Quisenberry told him, that Quisenberry had followed him while he was driving his truck and noticed that he had pulled the compression release, and threw oil all over Quisenberry's car. He also denied that at the time of discharge Quisenberry had told him that the repair shop had called Quisenberry concerning repairs to Bailey's truck, telling him that the motor had been ruined by someone pulling the compression release.

Upon examination by the Trial Examiner, Bailey admitted that at the time he was fired Quisenberry had said that the shop in Phoenix had told him that "somebody had been pulling the compression release on the truck, and holding it open and running it downhill that way." He told Quisenberry that the only time he ever pulled the compression release was when the truck broke a fuel line, took air, or to kill the engine.

On cross-examination the witness also said that on the night before he was fired he was at the 84 Truck Stop and pulled out his billfold which had a union button pinned in it and that he also took from his billfold his union book where he had a slip of paper with a phone number on it. Quisenberry was present and saw this and said to Bailey, "You still have your book?" Bailey admitted that he had, saying that he had to keep it because some day he might need it to work on a union job. On examination by the Trial Examiner, Bailey said that from the time he was hired until the night he was fired there was never any talk between him and Quisenberry about the Union.

Joseph G. Grossheim, a truck driver employed by the Company, testified as a witness on the subject of Bailey's discharge. Grossheim testified in a clear and forthright manner. He stated that around the end of May or the first of April he "deadheaded" a trip with Bailey, riding as a passenger. As they drove on this occasion, Bailey and Grossheim discussed the practice of pulling the compression release while the truck was moving down the high-

way. Bailey said that pulling the compression release blew the soot out of the motor and cleaned it. Grossheim disagreed violently. He told Bailey that such a practice would blow not only the soot, but everything else out with it, and not to do it. Bailey maintained that such a practice was good for the engine. Grossheim explained to him that all Bailey would do by pulling the compression release was to dump out raw diesel fuel. Bailey disagreed, saying that when you pulled the compression release you could see all the black smoke pour out of the exhaust, and that it really cleaned out the motor. The conversation ended when Grossheim asked Bailey not to do it while he was riding with him, and told him not to be it to Grossheim's truck, if he ever drove it.

Quisenberry admitted that at the time he hired Bailey he asked him to put his union affiliation on the application card. He stated that he purchased this form of application at a stationery store in Phoenix and that the place for "Activities other than religious" was on that card at that time. He explained that he had asked the men their union affiliation from the time he began hiring until about six weeks later, when he was told by Steele, his superior, that the latter thought the questions were in violation of the Act and that he should consult counsel for the Company on that subject. After conferring with the Company counsel, he discontinued the practice.

He said that the truck he gave to Bailey to drive had a brand new engine in it, and shortly there-

after that the truck became "sick." That it was continually missing, and breaking an injector line, and the Company had considerable trouble with it. He had the truck taken into the Phoenix shop for repair on two occasions. After it was in the shop for a third time, the shop crew informed Quisenberry that someone was pulling the compression release on the truck, while it was being driven, thus ruining the engine. Quisenberry began checking the drivers and he learned that Bailey had told several drivers that the way to clean the motor was to hold the foot on the throttle going uphill, and to pull the compression release going downhill. Suspecting that Bailey was pulling the compression release, on one night Quisenberry followed Bailey in his own car. Quisenberry stated that he often did this to check up on the efficiency of the drivers. He stated that on this occasion Bailey drove up a long grade just outside of Benson. Bailey had the truck in about fourth direct, with a three-quarter throttle, when all of a sudden a ball of black smoke came out of the truck and he could hear the motor go "cluck cluck" in such a way that Quisenberry knew the compression release had been pulled. He let Bailey continue to El Paso, and he turned around and went back to Tucson. On the next morning he called Bailey and told him that he had been pulling the compression release on the truck, and that he was fired. Bailey said that he had not pulled the release, but Quisenberry replied, "Bailey, I saw you do it."

The lay-off of Dayton and others.

Robert G. Dayton began employment with the

Company on May 15 and is still employed. When he was hired he was interrogated by Quisenberry about his union affiliation. On September 8 he was told by some of the men that there had been a layoff and that Quisenberry wanted Jenson and Dayton to call him. He called Quisenberry who told him that he wanted him to lay off for a few days. Dayton asked him the reason for his layoff. Quisenberry said, "It is about those applications you have been passing around and those tach cards." Dayton said, "I told you all about the tach cards. Now what applications do you mean?" Quisenberry said, "Those applications you have been passing around." Dayton testified that he supposed Quisenberry meant union applications because he had given one application to another driver who had asked Dayton for an application.

On September 10 Quisenberry called Dayton at his home and told him to contact all the men that had been laid off, and to have them at the 84 Truck Stop as he wanted to talk to them. Dayton asked what was up and Quisenberry replied that they were going back to work just as they had before the layoff. Dayton asked Quisenberry what had been wrong, and he said that it was the damn union deal, that he had received some "bum information from a damn lawyer or something like that." When Quisenberry saw the men at the 84 Truck Stop, he told them that they were all to go back to work, and operations were resumed.

Dayton testified that on several occasions he talked to Quisenberry, who told him that Mr. Steele

was a hardheaded man and that he was not going to see the job go union, and that Steele would jack up the trucks and let them sit, before he would let the job go union.

In his testimony Quisenberry made no specific reference to the incident about which Dayton testified.

In addition to the employees who claimed specific discriminations against them, there were several other witnesses who testified as to various events. William E. Turner testified credibly that he began work for the Company on April 13. When he was hired, Quisenberry asked if he was a member of the Union. Turner said he belonged to the Union, but despite this Quisenberry hired him. Quisenberry also told Turner to send in any other drivers that he found available, but that he wanted nonunion drivers. Turner told Quisenberry that in that part of the country if he wanted to have drivers he would have to take union drivers, as most of them were union. Quisenberry agreed that it looked as though they would have to take union men, so he told Turner to send any men who were good truck drivers and available, whether they were union or nonunion. Turner gave a test hop to Richins and testified that Richins did very well considering that he had had very little experience on heavy diesels. Turner resigned from the job of his own volition.

Alfred Jenson also testified to the circumstances of the layoff of Dayton and others. He testified that on September 9 when he reached Phoenix there

were approximately eight drivers at the truck stop and they told him that "We have had it." They told him that Quisenberry was going to make a change, and that word had been received that he was to call Quisenberry, so Jenson phoned Quisenberry. Quisenberry said he was going to transfer the job to El Paso; he also said, "Thanks for helping me out." When Jenson asked what he had done for Quisenberry, the latter said that Jenson had signed up all the boys in the Union. Quisenberry also said that they were going to take all the men off but seven, and leave seven men with seven trucks and that if they couldn't haul the gasoline with that number of trucks they would ship by railroad. Quisenberry told Jenson that he could come down and work at El Paso, but the witness said that he didn't want to do that, so Quisenberry said, "You have had it."

Jenson testified that he was instrumental in signing men up for the Union, that he obtained the signatures of employees to eleven applications, seven or eight of the men were at Tucson and the rest at El Paso. On cross-examination as to the lay-off Jenson said that on the following morning word was received from Quisenberry that all the drivers were to go back on their regular run. He also admitted that at the time of the layoff he asked Quisenberry if he was fired and that Quisenberry had replied in the negative. He also admitted that the layoff could have been for operational reasons. In the course of Jenson's testimony, the Trial Examiner asked to what the above testimony was di-

rected, and the General Counsel replied that the testimony was directed to establishing the layoff of the group of men for a period of one day. This allegation of the complaint will be later referred to.

Merrill E. Nutter testified credibly that he went to work for the Company in the first part of May. Quisenberry asked him if he belonged to the Union and the witness told him the truth—that he did not. Quisenberry explained to Nutter that he was running a nonunion job.

Nutter became a sort of straw boss on the job, and in late May or early June was given the duty by Quisenberry of instructing applicants for employment how to fill out the application blank, with particular reference to showing the applicant's union affiliation. Quisenberry also directed Nutter to take the filled out applications of employees previously hired, to find out their union affiliation and withdrawal card status, and to note that on the forms. About this time also, Quisenberry in a conversation with Nutter said that a man could not be fired for union activities, but there were numerous other reasons for which he could be fired.

In the latter part of May, Nutter's authority to handle the applications of prospective employees was taken from him. Around September 7 this authority was returned to him. However he stated that he felt that his authority had not been completely restored, and he was doubtful about his status. About the 4th of September, Quisenberry phoned and instructed him to fire Chester Robinson. Quisenberry told him that the reason for Robinson's

discharge was that Robinson had brought some union application blanks from El Paso and was passing them out on the job. However, Quisenberry said that he had just learned that Robinson had driven his truck over a curb, breaking the differential housing and that he was to be discharged for breaking this housing. The housing was broken about three weeks to a month before this conversation. Robinson was discharged but was put back to work, when all trucking operations were resumed after the short layoff of September 8. Nutter testified that on one occasion Quisenberry had asked him about the union membership of Jenson and on a second occasion about that of Richins.

H. B. Sullivan testified credibly that some time after August 21 he was interrogated by Quisenberry as to whether he had a withdrawal card from the Union. On that occasion Quisenberry told him that the job was nonunion. J. H. Beeson and Joe Delgado also testified credibly as to assisting Almada with the burned tire. Two employees, Wallsmith and Sanderson also testified very briefly and in a credible manner.

Motion to Consider Certain Testimony

At the opening of the hearing, the General Counsel moved to amend the complaint to allege (1) the name of Kenneth Van Horn as being discriminatorily discharged on May 12; (2) Sidney Bailey as being discriminatorily discharged on July 6; (3) Lloyd Hinds as being discriminatorily discharged October 1; (4) Chester Robinson as being discrim-

inatorily laid off for six full days beginning on or about September 4, 1953; (5) Robert Dayton, discriminatorily laid off for two full days beginning September 8, 1953; (6) and the names of Employees Nutter, Jenson, Saner, Parker, and Buchanan as being discriminatorily laid off on September 9 for one full day, and to amend certain dates which were typographical errors.

Over the objection of the Respondent, the Trial Examiner permitted all of the amendments, stating that in the event the Respondent pleaded surprise, the Respondent would be afforded an opportunity to prepare to refute any of these new allegations.

At the close of the General Counsel's case, the General Counsel moved to strike the name of Lloyd Hinds from the complaint. In the course of the hearing it developed that Hinds had been laid off while his truck was being repaired, and that the Company had been endeavoring to get in touch with Hinds to notify him that the repairs had been completed and that his services were required. He left the hearing room to go back to work. The General Counsel stated that it had developed that Hinds had not been discriminatorily laid off.

The General Counsel also moved to strike from the complaint all reference to the discriminatory layoff or discharge of Chester Robinson, and all reference to the discriminatory layoff of the five men named above, on September 9. There being no objection from the Respondent, these motions to strike were granted by the Trial Examiner, and the Respondent then put on its case.

After the evidence was closed the General Counsel in the course of his oral summation stated that, although he had moved to strike the above-mentioned allegations from the complaint, and to remove them as issues from the case, he requested the Trial Examiner to consider the testimony submitted to support these allegations, as bearing on the remaining issues in this case. The Respondent objected. He pointed out that the allegations had been stricken, and the charges dropped, at the end of the General Counsel's case, and that consequently the Respondent had not offered any evidence to rebut that testimony, in the belief that the allegations and charges had been dismissed. In his argument, counsel for the Respondent pointed out that without the allegations being in the complaint, much of the testimony admitted under the allegations would have been irrelevant to the remaining allegations, and would have been inadmissible on proper objection.

The Trial Examiner indicated that he felt that the position of the Respondent was correct, but that he would rule on the question in his Intermediate Report. I have considered the motion very carefully and have decided that substantial justice requires that I consider all the testimony as it bears on the allegations of violations of Section 8 (a) (1) of the complaint, for that purpose all of the testimony has relevancy; and that I not consider the testimony introduced to support allegations of discriminatory discharge or layoff, which were later stricken, as bearing on allegations of discriminatory discharge

or layoff, remaining in the complaint, for as to those allegations the testimony would not be relevant. For that reason I have not considered the testimony of Nutter on the subject of Robinson's layoff, or the testimony of Hinds as to his layoff, or the testimony of Jenson as to the layoff of the five named men, including Dayton, as having proper bearing on the cases of the remaining men, allegedly discriminatorily discharged or laid off. All testimony has been considered on the issues of Section 8 (a) (1) and all testimony except the above on issues of Section 8 (a) (3). To that extent, the General Counsel's motion is granted.

Concluding Findings

(a) Interrogation, restraint, and coercion.

From the testimony narrated above, it is established, and not seriously disputed, that in the period covered by the testimony the Respondent by the conduct of Quisenberry violated Section 8 (a) (1) of the Act by interfering with, coercing, and restraining the Company's employees in the exercise of the rights guaranteed to them by Section 7 of the Act. Many of the employees testified credibly that Quisenberry interrogated them as to their union membership and standing at the time of hire. Furthermore he urged, or ordered, various of the employees to refrain from union activities or active union membership, and in Almada's case exacted a promise that the employee would refrain from union activities before the employee was hired. In practically all hiring, Quisenberry by his procedure

left the strong inference in the minds of the employees that their employment resulted from the fact that they were either not in good standing in the Union, or not inclined to promote union activities on the job, and that their chances of continued employment would be seriously affected by their engaging in union activities. Many employees testified to this conduct of Quisenberry in the hiring procedure, and by a rather general admission, and further admissions as to specific conversations, Quisenberry corroborated this testimony. It is also apparent that this conduct of Quisenberry occurred not only at the time of original hire of the various employees, but continued for a considerable period of time after the inception of the trucking operation. From the evidence it is clear, and I find, that the instances of interrogation, restraint, and coercion were not isolated, but were part of a pattern or plan designed by Quisenberry to thwart any organizational activity on the part of the employees. In his testimony Quisenberry stated that he pursued this course because to some extent he was ignorant of the law, and inexperienced in labor matters. He further testified that it was his desire to keep the job nonunion, if possible, until such time as it was well established. I do not credit this testimony of Quisenberry that his intention and desire were so limited. On all the evidence in the case, Quisenberry's intention appears to have been to keep the job unorganized as long as possible. But even if his intention and purpose were so limited, that fact demonstrates the utter illegality of Quisenberry's

conduct. The rights guaranteed to employees by Section 7 of the Act cannot be suspended by an employer to suit the employer's pleasure or purposes. Whether the interference, restraint, or coercion imposed by the employer is intended to be effective for one day, one month, one year, or forever, it is violative of the rights of the employees.

On the basis of the credited testimony of employees named hereafter in specific findings and of Quisenberry, I find that in the hiring procedure, Quisenberry put into effect a plan to keep the men from engaging in union activities, and that this plan was violative of Section 8 (a) (1) of the Act.

Specific Violations of Section 8 (a)(1)

I also find specific violations of the Act, as follows:⁵

Upon the basis of the credited testimony of Almada and Quisenberry, I find that the Respondent interfered with, restrained, and coerced its employees in violation of Section 8 (a)(1) of the Act by the following conduct of Quisenberry:

(a) By his interrogation of Almada on April 11, 1953, in which Quisenberry asked Almada about his union affiliation and told the prospective employee that the Respondent sought to hire only union men, and by exacting from the employee a promise that the employee would not instigate any union activities on the job in the event he was hired;

⁵ Discussion of the credibility of employees and Quisenberry is given hereafter to avoid repetition.

(b) By stating to Alnada on approximately May 30, 1953, after employee Richins had been discharged, that Richins was a good fellow but that the Company could not use him because the Company did not want anything to do with the Union, and because Richins would vote for the Union;

(c) By stating to Alamada on May 24, 1953, that employee Cox had lied to him when he had inquired if the employee was a member of the Union, and that later Cox had borrowed \$20 from him, and that he had no use for a man like that, so he had discharged the employee;

(d) By instructing Alamada on or about May 15, 1953, to have nothing to do with the Union; and by telling the employee that he would have to send his withdrawal card to the Union, and tell the Union that he wanted no part of it.

Upon the credited testimony of Cox and Quisenberry, I find that the Respondent interfered with, restrained, and coerced its employees in violation of Section 8 (a) (1) of the Act by the following conduct of Quisenberry:

By his interrogation of Cox on May 15, 1953, in which Quisenberry asked Cox if he was keeping up his union book.

Upon the credited testimony of Jenson and Quisenberry, I find that the Respondent in like manner violated Section 8 (a) (1) of the Act by Quisenberry's interrogation of Jenson on April 12 as to the union affiliation of both Jenson and Cox and his statement that they would be employed inas-

much as they were not members in good standing of the Union.

Upon the credited testimony of Johnson and Quisenberry, I find that the Respondent in like manner violated Section 8 (a) (1) of the Act, by Quisenberry's interrogation of Johnson as to his union affiliation on or about April 25.

Upon the credited testimony of Richins and Quisenberry, I find that the Respondent in like manner violated Section 8 (a) (1) of the Act, by Quisenberry's interrogation of Richins on or about April 1 as to Richins' union affiliation and his statement to Richins that he was looking for nonunion drivers, and paid better than union scale to keep the job nonunion, and by his interrogation of Richins on May 22 as to how Richins would vote in the election.

Upon the credited testimony of Turner and Quisenberry, I find that the Respondent in like manner violated Section 8 (a) (1) on April 13, by Quisenberry's interrogation of Turner as to his union affiliation, and by Quisenberry's interrogation of Johnson as to his union affiliation and Quisenberry's instruction to the last-named employee to stop paying his dues in the Union.

Upon the credited testimony of Bailey and Quisenberry, I find that the Respondent in like manner violated Section 8 (a) (1) on May 25, by Quisenberry's interrogation of Bailey as to his union affiliation, and his instructions to Bailey to note on his application for employment the fact that he belonged to the Union.

The violations of Section 8 (a) (1) found above,

were alleged substantially in Paragraph 8 (a) through (p) of the complaint. Each allegation has been examined in the light of all the evidence, and the findings set forth above represent the extent to which I have found the allegations established by the credible evidence. Such portions of the allegations set forth in Paragraph 8 (a)-(p), not specifically found above, are hereby expressly not found, on the ground that they are not supported by sufficient credible evidence.

(b) Discriminatory discharges and layoffs.

In reaching a determination as to the legality of the discharges, as hereafter expressed, I have considered and weighed all the evidence as bearing on each discharge because the motive for the discharge of each employee is a question of fact, which must be determined in the same manner as all other questions of fact, on the evidence in the case as a whole.

The determination of these questions of fact involves a weighing of the inference of discrimination arising from Quisenberry's anti-union conduct and other evidence, as against Quisenberry's testimony and other evidence that the discharges were for cause. His anti-union conduct has been found above, so comment on his standing as a witness is appropriate at this point.

In my judgment Quisenberry was a reliable witness within certain well defined limits. He frankly admitted that he had interrogated employees as to their union affiliation and good standing, and had urged them to refrain from union activities, for a limited time. He made further admissions, against

the Respondent's interest, as to certain specific conversations with employees, which established certain violations of Section 8 (a) (1) of the Act. Because these admissions went beyond that required to establish a tactical appearance of candor, I deemed Quisenberry a reliable witness as to many features of his conduct in the hiring procedure, and resolved in Quisenberry's favor, certain conflicts in testimony between Quisenberry and the employees, as to what was said in particular incidents. That the findings of violation of Section 8 (a) (1) are not as broad as those alleged in the complaint, is due in a large measure to the credit I have attributed to Quisenberry's testimony. But when the alleged discriminatory discharges and layoffs are the subject of inquiry, Quisenberry's frankness and candor are much less pronounced. In my judgment, at that point Quisenberry's personal interest, and his employer's interest, exerted such an influence that his testimony became much less reliable. Some parts I have credited, and other parts I have rejected, based on the testimony of the case as a whole, and on Quisenberry's demeanor, bearing, and appearance as he testified as to the seven different charges of alleged discrimination.

The discharge of Van Horn. Van Horn as a witness impressed the undersigned very favorably. On both direct and cross-examination he testified in a clear and forthright manner which carried conviction to the auditor. I credit Van Horn's testimony fully. Quisenberry in his testimony on this subject admitted that he had discussed with Van Horn, just

prior to his discharge, the fact that Van Horn had engaged in a conversation with the "Old Man" at Blakely No. 1 gasoline station on the previous day. Quisenberry's admission affords some corroboration to the testimony of Van Horn. On the basis of Van Horn's and Quisenberry's testimony, I find that Van Horn was discharged because Quisenberry or his superior suspected Van Horn of engaging in union or concerted activities, and not because Van Horn was tardy in attendance on his scheduled runs. In reaching this conclusion I have given some weight among other things to the fact that Quisenberry at a later date rehired Van Horn, an act which would be consistent with Van Horn's testimony that Quisenberry in his discharge had given Van Horn a "chicken deal," and would be entirely inconsistent with Quisenberry's testimony, that Van Horn was so undependable that his employment could not be continued.

The discharge of Cox. Much of Cox's testimony I cannot and do not credit. As a witness he appeared to be an ardent advocate of his own cause, interested in the event, and vindictive toward Quisenberry. I am convinced that Cox's interest and animosity to Quisenberry led him to exaggerate certain features of his testimony, and to fabricate other portions which he thought would round out the whole of his testimony to his own advantage. I credit his testimony that when he applied for a job Quisenberry interrogated him about his union membership and that Cox lied to Quisenberry, concealing from the latter that he was a fully paid-up

member in the Union. I also credit his testimony that at the time of his discharge Quisenberry gave as the reason for his discharge the fact that Cox had driven in excess of the Company's speed limit. However, I do not credit that portion of Cox's testimony in which he stated that Quisenberry said that he had received a letter from the Union and thrown it in the wastebasket; or said that seeing that Cox was undecided how he would vote, he should get a union job; or that Quisenberry said that he knew he couldn't fire a man for joining a union, but that he would find a reason for discharging Cox and make it stick. Nor can I credit, that after being discharged in the manner which Cox related, that on the following day Cox confronted Quisenberry with the question, "What the hell did you fire me for?" Nor do I credit that, at that time Cox charged Quisenberry with firing him for his membership in the Union, and that Quisenberry admitted the discriminatory nature of Cox's discharge. This testimony is highly implausible, and when considered in relation to the demeanor and bearing of the witness, must be rejected, as a fabrication born of Cox's interest and vindictiveness.

Despite the fact that I do not credit much of Cox's testimony, it is established by the credited testimony of both Cox and Quisenberry that Cox was ostensibly discharged for speeding, and the question still remains, was that the real reason for the discharge?

From all the evidence it is clear that, at the time of Cox's discharge in the early days of the truck-

ing operation, the Company's speed limit was more honored in the breach than in the observance by the drivers. At that time the closing hour for the refinery at El Paso imposed a hardship on the operations, inasmuch as the men were hard-pressed to reach the refinery before it closed for the day. Several of the drivers and Quisenberry stated that on several occasions Quisenberry told the drivers to get to the refinery on time, even if it entailed violating the Company's speed limit. In view of those circumstances, the speeding by Cox does not appear to be a matter of much gravity, although speeding would certainly not be a trivial offense. In the light of all the circumstances, I conclude that the speeding of Cox was not a very compelling reason for his discharge, for in all other respects he appears to have been an efficient and competent driver. In my judgment the testimony of Almada, which I credit, focuses much light on Quisenberry's real reason for discharging Cox. It is clear that Quisenberry had approached the hiring of men for the job in a most realistic manner. He realized that in Texas and Arizona, to obtain efficient truck drivers he would have to take some truck drivers who belonged to the Union. From the hiring procedures used by Quisenberry, it is apparent that he wished to hire men who were nonunion, or men who, if they had been union in the past, were not actively engaged in union activities at the time of hire. According to Almada, Quisenberry was angered by the knowledge that he had hired Cox, who was a member in good standing of the Union, and who had

lied to Quisenberry about his membership in the Union in the course of his interview before hire. According to Almada, Quisenberry stated that he feared trouble from Cox later on. Under the circumstances that seems to be a natural reaction for Quisenberry, who then realized that he had hired an active adherent of the Union who did not hesitate to lie to gain his own ends. In hiring other men, Quisenberry by his hiring procedure had made reasonably sure that the men would not engage in Union activities, at least for some time. Undoubtedly Quisenberry felt that Cox constituted a prospective threat to Quisenberry's determination to keep the job non-union.

I deem it also significant that Quisenberry admitted that in the interview with Cox, at which Cox was discharged, Quisenberry asked the employee if he was still keeping up his union book.⁶

Perhaps it is true that the point which particularly angered Quisenberry was that Cox had lied to him about his union affiliation, but as I view that incident, Quisenberry had no right to interrogate Cox about his union affiliation, and if Cox gave Quisenberry a lie in answer to his illegal interrogation, that did not give Quisenberry the right to discharge Cox.

In his brief, counsel for the Respondent makes much of the fact that Cox lied to Quisenberry about his union membership at the time he was hired. Under the circumstances of Quisenberry's interrogation and Cox's answer, I do not consider Cox's

⁶ Tr. page 247.

untruthfulness such an ethical offense as would destroy his credibility as a witness. I view Cox's untruthfulness as a witness as a much more serious offense. However, on the preponderance of the credible evidence I am constrained to find that Cox was discharged because he was a paid-up member of the Union, and not because he had violated the Company speed limit.

The discharge of Johnson. As to the facts of this discharge I accept Quisenberry's testimony and reject that of Johnson. From the testimony of both men, it is certain that on the day of Johnson's termination, no specific words of discharge were addressed to Johnson by Quisenberry. When the fact became apparent in the course of his testimony, Johnson then stated that he had been told by Quisenberry many times that he would have to either drop his union book, or else. Prior to that point in his testimony, Johnson had testified several times that, from the day on which he was hired until the day of his termination, Quisenberry had not talked to him about the Union or his membership therein. I am satisfied that Johnson's first version, that Quisenberry and he had not discussed the Union or his membership, is the truth of the matter, and that his assertion that on many occasions he was told that he would have to drop his union book to work for the Company, is a fabrication born of Johnson's self-interest and partisanship. Nor do I credit the testimony of either Cox or Johnson that on an occasion after both had been fired, Quisenberry voluntarily told the men at the Truck Stop that in the

event the job went union, he would like to have both men back. Viewed in the light of all the evidence, taking into consideration Cox's demeanor as a witness, and Johnson's contradictory statements, I find that testimony to be unacceptable.

On the evidence as a whole, I find that Johnson voluntarily walked off the job, quitting his employment on May 15, 1953. On cross-examination Johnson reluctantly admitted that he was late for his scheduled run and that another driver had been dispatched on his run. Evidently he believed that when someone else was dispatched on his truck because of his tardiness that he was discharged by that act. Even if that portion of his testimony which I have rejected, were accepted, *arguendo*, that on many occasions he had been told that he would have to give up his book, or else, that course of conduct by the employer, would not give Johnson the right to anticipate his discriminatory discharge, walk off the job, and file a charge with the Board, which would seek his reinstatement, and pay for time he had not worked. I can discern no facts in this record upon which the theory of constructive discharge could be properly predicated.

The discharge of Richins. This employee, on the whole, testified in a creditable manner. Richins and Quisenberry both testified that Richins was ostensibly discharged because of transmission failure experienced in his truck.

Richins stated that he had experienced transmission failure only once, and that after the truck was repaired, he had no further trouble with it until

he was discharged. Quisenberry testified very clearly on this point. He said, that "when the truck was brought down" to Tucson, it had a rattling fifth gear, so the Company put the truck in the shop to have a new fifth gear installed. While the transmission was out of the truck in the shop, Quisenberry saw the gears of the transmission and except for the fifth gear they were in good shape. However, shortly after the truck was returned to service with Richins, the fifth gear dropped out at Lordsburg, and it was necessary to return the truck to the shop. When the transmission came out on this occasion, Quisenberry saw it again, and noticed that all teeth in gears Nos. 1-5 were rounded off. A brand new transmission was installed in the truck, and it was given back to Richins. A short time thereafter the truck again displayed a rattling fifth gear. At that point, according to Quisenberry, he decided that of the three drivers working on this truck, Richins was the least experienced, and that it was Richins who was damaging the transmission, so he fired Richins. After Richins was fired he had the truck taken to Phoenix, and upon examination of the transmission he found all gears Nos. 1-5 in the same condition as before, the corners rounded off.

Quisenberry's testimony, at first glance, appears to establish his contention that Richins was discharged for cause. But there are other facts in this record that rise to challenge his testimony. One of these facts, undisputed in the record, is that the truck in question, Truck No. 11, had a higher-gear

ratio than two other trucks of the same make used by the Company, and that shortly after Richins' discharge a set of gears of lower ratio was installed in this truck, because it was found that the higher gear ratio was unsuitable to the heavy duty performed by the trucks. On cross-examination Quisenberry admitted that the larger gears were found necessary and installed. Thus it appears very questionable that Richins' lack of experience had anything to do with the transmission failure or failures in Truck No. 11. A second fact of importance is that Richins was discharged before Quisenberry inspected the gears for the second time and not afterward. Thus, Quisenberry's knowledge of the condition of the gears on the occasion of the second overhaul, could not possibly have played any part in his decision to discharge Richins. So, the undisputed facts as to the transmission failure at the time of Richins' discharge, are these: (1) At the time Truck No. 11 was brought to Tucson, and put in service, it had a rattling fifth gear, with which the evidence does not connect Richins in any way. (2) Because of the rattling fifth gear, a new fifth gear was installed, and the other gears on examination were found to be in good condition. (3) After Truck No. 11 was returned to Richins, the fifth gear dropped off at Lordsburg, and the transmission was torn down again. This time, examination revealed, that in addition to the broken fifth gear all other gears were rounded off, so a whole new transmission was installed. (4) After the truck was returned to Richins and a few trips made, the fifth gear rattled

again. (5) Quisenberry, then decided that Richins' lack of experience was the cause of the mechanical failures, and discharged Richins. (6) On overhaul, all gears were found to be rounded off, as on the prior overhaul. (7) A short time thereafter, upon further trouble with the transmission, a whole new set of gears with a lower gear ratio was installed in the truck. This repair gave the truck the same gear ratio, as on other trucks of the same type and make which were functioning satisfactorily.

When these facts are fully appreciated, it then appears that Richins' driving, or lack of experience, had little or nothing to do with the transmission failures in Truck No. 11. The failures preceded his handling of the truck, and continued after his discharge, and it was finally determined that what the truck needed was a set of gears of a lower ratio which were more suited to the heavy duty which the truck was required to perform.

However, this leaves our examination in this position. Although it appears questionable that Richins was really to blame for the mechanical failures, did Quisenberry honestly believe him to be at fault and thus discharge him for cause, even if mistakenly?

From Quisenberry's testimony, and all other evidence in the case, I am satisfied that Quisenberry was an experienced and alert operator of the truck line, and that he appreciated the true condition of Truck No. 11, and the reason for its periodic transmission failures, at and before the time he fired Richins. An experienced diesel operator like Quisenberry must have appreciated the significance of

the different gear ratios in the trucks, when two trucks of the same type and make, with low gear ratios gave him satisfactory service on heavy duty work, and a third of the same make and type but with a higher gear ratio, continually broke down.

The fact that larger gears were installed shortly after Richins' discharge, is an established fact that throws considerable doubt on Quisenberry's claim that he believed the employee responsible for the damaged transmissions. Also, if Quisenberry believed that some driver caused the damage, how was the blame placed on Richins of the several drivers who drove Truck No. 11? Quisenberry's testimony is that he placed the blame on Richins because Richins was the least experienced of the drivers and because he had ridden with the other drivers and found them to be good drivers, and because he judged the other drivers to be better than Richins, with whom he had never ridden.

Opposed to Quisenberry's testimony and the facts as to the damaged transmission, there is other testimony. Both Almada and Richins testified that three days before Richins' discharge, Quisenberry asked Richins in Almada's presence how Richins would vote in the election, and that Richins had said he wouldn't cut off his nose to spite his face. Quisenberry admitted this interrogation of Richins. At that time, three days before his discharge, Quisenberry was much more interested in Richins' vote in the election, than he was in the young man's ability as a truck driver. Also, Almada testified credibly that after Richins was fired Quisenberry told him

that he hated to fire Richins, but that he had to, because Richins would vote against him in the election.

On all the evidence in the case, I find that it is not established that Richins' inexperienced, and inexperienced driving caused the damage to Truck No. 11. I also find, that Quisenberry seized the continuing trouble with the transmission as a pretext to discharge Richins, who he feared would "vote against him" in the election, and that he did not believe that Richins' inexperienced driving had caused damage to the truck.

The discharge of Almada. This employee was by far the most impressive of the General Counsel's witnesses. Almada appeared to be an intelligent and alert young man, and he testified in a forthright and convincing manner. Although he appeared displeased with much of Quisenberry's conduct about which he testified, he evinced no vindictiveness toward Quisenberry, and appeared to testify with fairness to all concerned in the proceeding. I credit Almada's testimony.

From all the testimony, including that of Almada and Quisenberry, it is clear that Quisenberry considered Almada to be the leading adherent of the Union among the men. From all the testimony it is likewise clear that Almada was respected by his fellow-employees and by Quisenberry. As a result of Almada's pre-eminence, he was particularly the target of much of Quisenberry's anti-union conduct. Almada's uncontradicted testimony establishes that Quisenberry feared that Almada would lead

the men into the Union, and for that reason he took stronger countermeasures with Almada than with any other man. This conduct of Quisenberry gives rise to the strongest kind of inference that Almada's discharge, in reality, arose from Quisenberry's fear that Almada constituted an obstacle to Quisenberry's efforts to keep the job nonunion.

However, counterbalancing this strong inference are two facts which I deem of preponderant weight. The first is, that though Quisenberry on several occasions displayed the utmost anxiety about Almada's position relative to any union activity, he apparently was satisfied by Almada's continual reassurance that in good faith the employee was keeping his promise not to influence the other men. The second fact, of greater weight, which is not disputed, is that Almada violated the Company rule as to bumping tires, burned up a tire on the road, and endangered \$30,000 worth of the Company's equipment. It is likewise undisputed that after Quisenberry saw how badly the tire was burned, and learned that it had been left in the desert, because it was too hot for the tire rack of the truck, that he phoned Almada and discharged him.

On all the evidence in the case, I find that this tire was burned and the equipment endangered because Almada had not bumped his tires as required by the Company rules. I find that the positive proof that the tire was burned, coupled with Quisenberry's testimony on this point which I credit, outweighs the inference arising from Quisen-

berry's anti-union conduct. I find therefore that Almada was discharged for cause.

The discharge of Bailey. Quisenberry testified credibly that he discharged Bailey because that employee was pulling the compression release on his truck, under the mistaken belief that it cleaned the motor, when in reality this practice was ruining the motor. Quisenberry explained that when considerable repairs were needed on Bailey's truck, and the repair shop told Quisenberry that pulling the compression release while rolling was the cause of the trouble, he initiated an investigation among the drivers and learned that Bailey claimed this practice cleaned the motor. To confirm his suspicions, on one night he followed Bailey, and heard the employee pull the compression release. Before Bailey's next run Quisenberry discharged the employee.

Joseph G. Grossheim, an employee-witness who testified in a very credible manner, told of an occasion when Bailey advocated the practice of pulling the compression release to clean out the motor in a conversation with him.

Bailey as a witness did not impress the undersigned favorably. He appeared highly interested in advancing his own cause, and at one point I deem his testimony untruthful. Bailey denied that he had ever pulled the compression release at improper times but these denials were not convincing. It appears from all the testimony as to Bailey, that he was not outstanding in any way among the drivers, and had not participated in any union activities while on the job.

To account for Quisenberry's discrimination against him, Bailey testified that on the night before his discharge, he was in the 84 Truck Stop with Quisenberry and some other drivers. On this occasion, he took out his wallet which had a union button pinned in it, and he also took from his wallet his union book which had a phone number he desired: that Quisenberry saw the button and the book and said to Bailey, "You still have your book?" And on the following day discharged him. On being questioned by the Trial Examiner, Bailey testified that from the time he was hired until that night, he and Quisenberry had never discussed the Union. I cannot, and do not accept the testimony of Bailey as to the incident at the 84 Truck Stop. The fortuitous combination of circumstances related by Bailey, places too heavy a strain on my credulity. Heretofore, I have noted, that I credit Bailey's testimony as to Quisenberry's procedure in hiring him.

On the evidence in the case as a whole, and particularly on the credited testimony of Quisenberry and Grossheim as related above, I find that Bailey was discharged for cause.

The layoff of Dayton. This employee testified in a creditable manner. I accept his testimony fully. Dayton testified that when he was laid off, Quisenberry in a telephone conversation, told him that he was laid off because of some tachograph charts and the "applications you have been passing around." When Dayton was notified by Quisenberry to return to work, Quisenberry gave as his reason for the

layoff that he had received "some bum information from a damned lawyer," and that the layoff was due to the "union deal." As noted heretofore, the Respondent offered no evidence on this layoff. On the testimony of Dayton, viewed in the light of all the evidence, it would appear that the layoff of Dayton was caused by some decision which was taken by the Company because of the union activity among the men, which decision was later reversed for some unknown reason. But neither the testimony of Dayton, nor the case as a whole, sheds further light on why the layoff occurred, or ended. What Quisenberry said in laying off Dayton, and what he said in returning him to work, raises a strong suspicion that the layoff was a reprisal by the Company against the men, or some other sort of discriminatory measure. However, strong suspicion is not sufficient to support the allegation that this layoff was discriminatory. On the evidence as a whole, including the credited testimony of Dayton, I find that the evidence is insufficient to establish that this layoff was discriminatory in nature.

I further find that the discharges of Van Horn, Cox, and Richins, as found above, constitute violations of Section 8 (a) (1) and (3) of the Act.

IV. The effect of the unfair labor practices upon commerce

The activities of the Respondent, set forth in Section III above, to the extent that they have been found to constitute unfair labor practices, occurring in connection with the operations of the Respondent

described in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce, and the free flow of commerce, as defined in Section 2 (6) and (7) of the Act.

V. The remedy

Since it has been found that the Respondent has engaged in certain unfair labor practices, it will be recommended that it cease and desist from said unfair labor practices and take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent discriminated with respect to the hire and tenure of employment of Kenneth L. Van Horn, E. W. Richins, Jr., and John Cox by discharging them because of their union and concerted activities, it will be recommended that Respondent offer to the named employees immediate and full reinstatement to their former or substantially equivalent positions,⁷ without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered by reason of the Respondent's discrimination against them, computed in accordance with the formula stated by the Board

⁷ The Chase National Bank of the City of New York, San Juan, Puerto Rico, Branch, 65 NLRB 827. Reinstatement of Van Horn is recommended because though he was rehired, the record does not disclose whether or not he was restored to his former position, with all rights and privileges.

in *F. W. Woolworth Company*, 90 NLRB 289. It will also be recommended that the Respondent make available to the Board, upon request, payroll and other records to facilitate the checking of the amount due.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, the undersigned makes the following:

Conclusions of Law

1. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 310, AFL, is a labor organization within the meaning of Section 2 (5) of the Act.

2. By discriminating in regard to the hire and tenure of employment of Kenneth L. Van Horn, E. W. Richins, Jr., and John Cox, thereby discouraging membership in a labor organization, Respondent has engaged in unfair labor practices within the meaning of Section 8 (a) (1) and (3) of the Act.

3. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

5. The Respondent did not discharge Harry M. Almada, William J. Johnson, or Sidney W. Bailey

for discriminatory reasons as alleged in the complaint.

6. The evidence is insufficient to establish that the layoff of Robert G. Dayton was discriminatory in nature as alleged in the complaint.

Recommendations

Upon the basis of the above findings of fact and conclusions of law, the undersigned recommends that Texas Independent Oil Company, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 310, AFL, or any other labor organization of its employees, by discriminating in regard to their hire or tenure of employment, or any term or condition of employment;

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 310, AFL, or any other labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

2. Take the following affirmative action which

the undersigned finds will effectuate the policies of the Act:

(a) Offer to Kenneth L. Van Horn, E. W. Richins, Jr., and John Cox immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered by reason of the Respondent's discrimination against them in the manner set forth in the section above entitled "The remedy."

(b) Upon request, make available to the Board or its agents, for examination and copying, all payroll records and reports, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of back pay due and the right of reinstatement under this recommended order.

(c) Post at its office at Phoenix, Arizona, copies of the notice attached hereto and marked Appendix. Copies of said notice, to be furnished by the Regional Director for the Sixteenth Region, shall, after being duly signed by the Respondent's authorized representative, be posted by the Respondent immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for the Six-

teenth Region, in writing, within twenty (20) days from the receipt of this Intermediate Report and Recommended Order, what steps the Respondent has taken to comply herewith.

It is also recommended that the several allegations of the complaint stating that Harry M. Almada, William J. Johnson and Sidney W. Bailey were discriminatorily discharged, and stating that Robert G. Dayton was discriminatorily laid off, be dismissed.

It is further recommended that unless on or before twenty (20) days from the receipt of this Intermediate Report and Recommended Order, the Respondent notify the said Regional Director, in writing, that it will comply with the above recommendations, the National Labor Relations Board issue an order requiring it to take such action.

Dated this 27th day of January, 1954.

/s/ DAVID F. DOYLE,
Trial Examiner

APPENDIX

Notice to All Employees Pursuant to the Recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

We Will Not discourage membership in International Brotherhood of Teamsters, Chauffeurs, Ware-

housemen and Helpers of America, Local Union No. 310, AFL, or any other labor organization of our employees, by discriminating in regard to their hire or tenure of employment or any term or condition of employment.

We Will Not in any manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form, join, or assist International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 310, AFL, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the National Labor Relations Act.

We Will offer to Kenneth L. Van Horn, E. W. Richins, Jr., and John Cox immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to any seniority or other rights and privileges previously enjoyed, and make them whole for any loss of pay suffered as a result of discrimination against them.

All of our employees are free to become or remain members of the above-named union or any

other labor organization. We will not discriminate against any employee because of membership in or activity on behalf of any such labor organization.

TEXAS INDEPENDENT OIL
COMPANY, INC., (Employer)

By
(Representative) (Title)

Dated.....

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[Title of Board and Cause.]

EXCEPTIONS TO EXAMINER'S REPORT
AND RECOMMENDATIONS

Now comes the Texas Independent Oil Company, Inc., by its attorneys, Langmade and Sullivan, pursuant to the Rules and Regulations, and hereby takes exception to the intermediate report and recommended order of the Trial Examiner, dated January 27, 1954, in the above entitled matter:

I.

The finding and recommendation, line 4 to 15 inclusive, page 27, that the "hire and tenure of Kenneth L. Van Horn, E. W. Richins, Jr., and John Cox" was terminated because "of their union and concerted activities", and the recommendation they be restored and made whole on any loss of earnings, because:

1. These men were discharged for cause.

2. They were discharged during their probationary period of employment.

3. There was no evidence of these men having engaged in union or concerted activities.

4. The mere self-serving statement by a discharged employee that he "assumed" he was discharged for union activities, and at the same time denying he so engaged, does not support a finding that the employee engaged in, or was discharged for engaging in union and concerted activities.

5. The evidence does not support the finding, and is against the weight of the evidence.

II.

Exception is taken to the "Concluding Findings", lines 10 to 55 inclusive, page 18, because:

1. It was seriously disputed and denied the Respondent, by the conduct of Quisenberry, violated Sec. 8 (a) (1).

2. Interrogation as to membership in a union, in itself, is not per se, a violation of the Act, especially when the evidence shows that the man was employed, and was not denied a position, when there was, in fact, a vacancy, because of his membership in a union.

3. The laws of Arizona prohibit denying a man a position because of his non-membership in a union.

4. The mere fact that Quisenberry requested, or expressed the desire to some of the men the first month of their operations, and before he had obtained a full crew, that he would appreciate their

withholding an organization meeting until they were under way or "got rolling", was not coercion, or intimidation, or threats.

5. The Examiner's statement line 47 to 50, page 18, that "The interference, restraint, or coercion imposed by the employer is intended to be effective for one day, one year or forever", is not applicable, because:

(a) There was no interference, restraint or coercion. The mere request of Quisenberry that they defer, did not prevent their meeting. There was no surveillance, as alleged, no proof, or evidence introduced. A request does not amount to coercion.

(b) Free speech entitles an employer to say to his employees he would appreciate not organizing until he secured a full crew. A request to defer was an acknowledgment of their right to organize, not a denial.

III.

An employee may be discharged for cause, and it is not a defense to such discharge that an employer at some time was charged with an unfair labor practice.

1. The National Labor Relations Act is not designed to supplant the Courts for the recovery of damages and to adjudicate private rights, and there is nothing in the act which restricts freedom of speech on the part of supervisory employees. (N.L.R.B. vs. Budd, (169 Fed. (2) 571).)

Respectfully submitted,

LANGMADE & SULLIVAN,

/s/ By STEPHEN W. LANGMADE

[Title of Board and Cause.]

GENERAL COUNSEL'S EXCEPTIONS TO INTERMEDIATE REPORT, I. R. (SF) 286

Comes now Allen P. Schoolfield, Jr., Counsel for General Counsel, and files with the National Labor Relations Board the following Exceptions to the Intermediate Report in the instant case issued by the Honorable David F. Doyle, Trial Examiner.

I.

Counsel for the General Counsel excepts to the findings and conclusions of the Examiner on the discharge of Harry M. Almada. The Examiner found "On all the evidence in the case, I find that this tire was burned and the equipment endangered because Almada had not bumped his tires as required by the Company rules. I find that the positive proof that the tire was burned, coupled with Quisenberry's testimony on this point which I credit, outweighs the inference arising from Quisenberry's anti-union conduct. I find, therefore, that Almada was discharged for cause." (IR page 25, lines 35-40.)

II.

The Examiner's conclusions that "The Respondent did not discharge Harry M. Almada, William J. Johnson or Sidney W. Bailey for discriminatory reasons as alleged in the complaint". (IR page 27, Conclusions of Law No. 5, lines 41-43.)

III.

The failure of the Trial Examiner to find and conclude upon the basis of the entire Record that Respondent discriminatorily discharged Harry M. Almada, William Johnson and Sidney W. Bailey for the reason that they were engaged in concerted activities as protected by Section 7 of the Act.

Wherefore, Counsel for General Counsel respectfully requests that the Board reverse the Honorable Trial Examiner herein on the points stated above, and that after due consideration of these Exceptions and the Brief filed in support hereof, the Board issue a Cease and Desist Order, together with appropriate relief, concerning the allegations of the General Counsel as set forth in the Complaint as amended, and referred to herein.

Dated at Fort Worth, Texas, this 17th day of February, 1954.

Respectfully submitted,

/s/ ALLEN P. SCHOOLFIELD, JR.,
Counsel for General Counsel

United States of America
Before the National Labor Relations Board

Case No. 33-CA-230

TEXAS INDEPENDENT OIL COMPANY,
INC., and INTERNATIONAL BROTHER-
HOOD OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS OF
AMERICA, LOCAL UNION No. 310, AFL.

DECISION AND ORDER

On January 27, 1954, Trial Examiner David F. Doyle issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged and was engaging in certain unfair labor practices in violation of Section 8 (a) (1) and (3) of the Act, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. The Trial Examiner also found that the Respondent had not engaged in certain other alleged unfair labor practices, and recommended dismissal of those allegations of the complaint. Thereafter, the Respondent and the General Counsel filed exceptions to the Intermediate Report and briefs.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and

the entire record in the case,¹ and hereby adopts the findings, conclusions and recommendations of the Trial Examiner with the following modifications:

The Trial Examiner found that the Respondent discharged Almada for cause and not, as alleged in the complaint, for union activity. A careful review of the facts convinces us that there is merit in the General Counsel's exception.

As set forth in the Intermediate Report, Manager Quisenberry went to Almada's home on April 11, 1953, to interview him about a job as truck driver with the Respondent. Quisenberry asked him whether or not he belonged to the union. Almada replied that he was a paid up member in good standing. Quisenberry remarked that that "let Almada out," as Quisenberry was hiring only nonunion men. Almada said that he sure needed the job. Quisenberry then stated that he would hire Almada if Almada would drop his union book, withdraw from the Union, and promise not to instigate any union activity either on or off the job and do nothing to cause "trouble" between the Respondent and the Union. Almada replied that he would comply with these conditions.

Shortly thereafter Almada was hired and given a "test hop" by Quisenberry, during which Quisenberry again told Almada that he did not want the

¹ The Respondent's request for oral argument is hereby denied because, in our opinion, the record, the exceptions and the briefs adequately present the issues and the positions of the parties.

Union. Before long Quisenberry was using Almada's home in Lordsburg for his headquarters, and offered to promote Almada to a supervisory position. Almada declined because he wanted to remain in good standing with the other drivers.

On May 15, the Union filed a representation petition with the Board, and a copy was served on the Respondent. Quisenberry, apparently disturbed by this turn of events, phoned Almada to say that the Respondent's vice president, Horace Steele, was angered and had instructed Quisenberry to get rid of Almada because he was union "all the way through." Quisenberry added, and for emphasis repeated, that Almada would either have to send his withdrawal card back to Union Representative Bone and resign, "or else." About May 22, Quisenberry, in a conversation with Almada and another employee, Richins, cautioned them that he had discharged employee Cox upon learning that Cox was a paid up union member, and asked Almada how he was going to vote in the prospective election. Almada replied that although he would not instigate any union activity he was for the union and would vote accordingly. On May 28 or 29, Quisenberry, in a conversation with Almada and another employee, Beeson, again warned Almada by advising that he had discharged employee Richins because Richins was getting union ideas in his head and would vote against Quisenberry at the election. A few days later Quisenberry repeated this admonition to Almada.

On June 3, Almada, through no fault of his own,

was delayed for almost two hours in fueling his truck. Upon completing the fueling, he attempted to make up for the lost time, and, for about 80 miles did not "bump" his tires to determine whether they retained sufficient air pressure. Although it was agreed that the better practice was to bump tires every 60 or 70 miles, Almada's conduct conformed to a set of rules issued over Quisenberry's signature, stating in part: "Drivers will bump tires at least every 80 miles * * *" (emphasis added.) Unfortunately, he discovered that one of the dual tires had gone flat and was burned up from the resulting friction. Although there is testimony by Quisenberry which the Trial Examiner credited that a burned tire endangered the equipment, no actual damage other than to the tire resulted in this instance, for the truck was empty and contained no dangerous petroleum products of any kind. Nevertheless, upon learning of this misadventure,—apparently the only occasion on which Almada had burned a tire—Quisenberry discharged him.

After discharging Almada, Quisenberry put employee Wallsmith in his place. Wallsmith had burned tires on at least two previous occasions. However, unlike Almada, he was not a union member.

On these facts the Trial Examiner concluded that Quisenberry was not unlawfully motivated because he "apparently was satisfied" that Almada, although a known union leader, was not influencing the other employees in favor of the Union, and in any event Almada had in fact ruined a tire. However, the

Trial Examiner did not explain why Quisenberry would have made repeated coercive statements to Almada, enumerated above, if he were really satisfied as to Almada's union attitude. Nor did the Trial Examiner give weight to the fact that Quisenberry replaced Almada with a nonunion employee who had at least twice burned tires.

We are satisfied, as was the Trial Examiner, that Quisenberry considered Almada to be the leading union adherent among the employees; that Quisenberry had engaged in a course of unlawful conduct, including interrogation and threats about union activity, designed to thwart such activity on the part of the employees and to apprise them, not only at their initial interview but thereafter as well, that their employment would be adversely affected if they engaged in union activity; and that Quisenberry had in fact discharged three other employees for union activity. In this setting we are unable to agree with the Trial Examiner that Almada was discharged for cause. Almada had not violated the Respondent's rule about bumping tires. Moreover, the evidence shows that the burning of a tire is an occasional business hazard which did not deter the Respondent from replacing Almada with a non-union driver who had previously burned tires on at last two occasions. In view of the Respondent's other unlawful conduct, we accordingly find that the Respondent's manager, Quisenberry, discharged Almada for exercising his protected right to join and assist the Union, and that the burning of the tire was a mere pretext which the Respondent seized

upon in an attempt to conceal its unlawful motive.

Because of the Trial Examiner's finding with respect to Almada, we shall, in accordance with our usual practice, exclude the period from the date of the Intermediate Report to the date of the Order herein in computing the amount of back pay awarded to Almada.²

Order

Upon the entire record in this case and pursuant to Section 10 (c) of the National Labor Relations Act as amended, the National Labor Relations Board hereby orders that the Respondent, Texas Independent Oil Company, Inc., Phoenix, Arizona, and its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Discouraging membership in International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 310, AFL, or any other labor organization of its employees, by discharging any of its employees or discriminating in any other manner in regard to their hire, tenure, terms or conditions of employment:

(b) In any other manner interfering with, restraining or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 310, AFL,

² Pacific Intermountain Express Company, 107 NLRB No. 158, footnote 26.

or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Offer to Kenneth L. Van Horn, E. W. Richins, Jr., John Cox, and Harry M. Almada immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings suffered by reason of the Respondent's discrimination against them in the manner set forth hereinabove and in the Intermediate Report;

(b) Upon request, make available to the National Labor Relations Board or its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary for the determination of the amounts of back pay due under the terms of this Order;

(c) Post at its office at Phoenix, Arizona, copies

of the notice attached to the Intermediate Report as an Appendix.³ Copies of said notice, to be furnished by the Regional Director for the Sixteenth Region, shall, after being signed by the Respondent, be posted by the Respondent immediately upon receipt thereof and maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(d) Notify the Regional Director for the Sixteenth Region in writing, within ten (10) days from the date of this Order, what steps the Respondent has taken to comply herewith.

It Is Further Ordered that the allegations of the complaint that the Respondent discriminated against William J. Johnson, Sidney W. Bailey, and

³ The notice shall be modified, however, by replacing the words "The Recommendations of a Trial Examiner" with the words "A Decision and Order" and by adding after the words "E. W. Richins, Jr." the words "Harry M. Almada." In the event that this order is enforced by a decree of a United States Court of Appeals, there shall be further substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

Robert C. Dayton be and they hereby are dismissed.

Dated, Washington, D. C., April 30, 1954.

[Seal] GUY FARMER, Chairman
 ABE MURDOCK, Member
 IVAR H. PETERSON, Member
 PHILIP RAY RODGERS, Member
 ALBERT C. BEESON, Member
 National Labor Relations Board

In the United States Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
vs.

TEXAS INDEPENDENT OIL COMPANY,
INC., Respondent.

**CERTIFICATE OF THE NATIONAL LABOR
RELATIONS BOARD**

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 102.84, Rules and Regulations of the National Labor Relations Board—Series 6, as amended, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of a proceeding had before said Board, entitled, "Texas Independent Oil Company, Inc., and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,

Local Union No. 310, AFL," Case No. 33-CA-230 before said Board, such transcript including the pleadings and testimony and evidence upon which the order of the Board in said proceeding was entered, and including also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

1. Order designating David F. Doyle Trial Examiner for the National Labor Relations Board, dated October 6, 1953.

2. Stenographic transcript of testimony taken before Trial Examiner Doyle on October 6 and 7, 1953, together with all exhibits introduced at the hearing.

3. Respondent's request for extension of time to file brief dated October 23, 1953.

4. Copy of Associate Chief Trial Examiner's telegram, dated October 26, 1953, to all parties granting extension of time to file briefs.

5. Copy of Trial Examiner's Intermediate Report and Recommended Order dated January 27, 1954 (annexed to Item 9 hereof); order transferring case to the Board dated January 27, 1954, together with affidavit of service and United States Post Office return receipts thereof.

6. Respondent's request for oral argument received by the Board on February 16, 1954. (Denied, see page 1, footnote 1 of Board's Decision and Order.)

7. Respondent's exceptions to Intermediate Re-

port and Recommended Order received February 16, 1914.

8. General Counsel's exceptions to Intermediate Report and Recommended Order received February 16, 1954.

9. Copy of Decision and Order issued by the National Labor Relations Board on April 30, 1954, with Intermediate Report and Recommended Order annexed, together with affidavit of service and United States Post Office return receipts thereof.

10. Respondent's petition for rehearing and exhibits attached thereto, received October 4, 1954.

11. General Counsel's answer to Respondent's petition for rehearing, dated October 8, 1954.

12. Respondent's reply to General Counsel's answer to the petition for rehearing, dated October 18, 1954.

13. Copy of Board's Order denying Respondent's petition, dated November 2, 1954, together with affidavit of service and United States Post Office return receipts thereof.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 25th day of March, 1955.

[Seal] /s/ FRANK M. KLEILER,
 Executive Secretary, National
 Labor Relations Board

[Endorsed]: No. 14680. United States Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. Texas Independent Oil Company, Inc., Respondent. Transcript of Record. Petition for Enforcement of an Order of the National Labor Relations Board.

Filed: March 28, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit

No. 14680

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

TEXAS INDEPENDENT OIL COMPANY,
INC., Respondent.

PETITION FOR ENFORCEMENT OF AN
ORDER OF THE NATIONAL LABOR RE-
LATIONS BOARD

To the Honorable, the Judges of the United States
Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 141, et seq.), hereinafter called the Act, respectfully petitions this

Court for the enforcement of its order against Respondent, Texas Independent Oil Company, Inc., Phoenix, Arizona, and its officers, agents, successors and assigns. The proceeding resulting in said order is known upon the records of the Board as "Texas Independent Oil Company, Inc. and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 310, AFL," Case No. 33-CA-230.

In support of this petition the Board respectfully shows:

(1) Respondent is an Arizona corporation engaged in business in the State of Arizona, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

(2) Upon due proceedings had before the Board in said matter, the Board on April 30, 1954, duly stated its findings of fact and conclusions of law, and issued an Order directed to the Respondent, Texas Independent Oil Company, Inc., Phoenix, Arizona, and its officers, agents, successors and assigns. On the same date, the Board's Decision and Order was served upon Respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Respondent's counsel.

(3) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the proceeding before the Board upon which the said Order was entered,

which transcript includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and the Order of the Board sought to be enforced.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondent and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the Order made thereupon a decree enforcing those sections of the Board's said Order which relate specifically to the Respondent herein, and requiring Respondent, and its officers, agents, successors and assigns, to comply therewith.

Dated at Washington, D. C., this 3rd day of March, 1955.

NATIONAL LABOR RELATIONS
BOARD,

/s/ By MARCEL MALLET-PREVOST,
Assistant General Counsel

[Endorsed]: Filed Mar. 4, 1955. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

ANSWER

Comes now the Respondent, Texas Independent Oil Company, Inc., by its attorneys, Langmade & Sullivan, pursuant to rule 34 of this Honorable Court, and for answer in reply to the Petition for

Enforcement of an order of the National Labor Relations Board, admits, denies and alleges as follows:

I.

Answering paragraph numbered (1) of the Petition, admits the Respondent is an Arizona Corporation, and the jurisdiction of this Court, but denies the commission of an unfair labor practice within the judicial circuit or elsewhere.

II.

Answering paragraph numbered (2) of the Petition, admits the proceedings before the Board resulted in an order dated April 30, 1954 directed to the Respondent, as alleged, directing the reinstatement of four employees, together with back pay, and that the decision and order was served, and in this connection allege a Motion for Rehearing was filed setting forth grounds for the modification and the setting aside of said order in so far as it directed the reinstatement, and back pay of the following employees, and the amount set opposite their names, viz:

Kenneth L. Van Horn	\$1,259.62
John E. Cox	238.90
E. W. Richins, Jr.	840.46
Harry M. Almada	1,141.46

III.

Answering paragraph numbered (3) of the Petition, this Respondent has not received or been served with the transcript alleged to be filed at the

time this answer is prepared, and in this connection states its desire to file a supporting brief upon receiving such transcript.

IV.

Further answering the Petition, your Respondent alleges there was cause shown for the discharge of each of the above named employees, and there was no finding of fact by either the Examiner or the Board that the cause for discharge was not established, or that it was not sufficient in itself to warrant the discharge in each case.

The reinstatement and back pay was ordered and directed upon evidence that a fellow employee, Quisenberry, in employing the men had inquired of their union affiliation, and discussed his philosophy with the men, stating that he had once belonged to a union and believed he was better off without a membership. Conversations between employees, the Board found to have constituted the unfair labor practice.

It is alleged that the officers of the Respondent had no knowledge of the conversations carried on between the employees, that the Board holds to be unfair, and that when it was called to the attention of the Respondent, its President immediately directed Quisenberry to stop discussing with other employees the merits of union affiliation; that thereupon, and before any complaint was filed, the conversations ceased upon direct orders of the Company.

There was no showing, or evidence that there was a policy of the Company to discriminate against

union men, and the Company had no knowledge, and did not consent or approve the interrogation by Quisenberry of the union affiliation, and no man was refused employment because of his union membership.

V.

Almada was discharged for failure and neglect to test the tires in accordance with the rules of the Company, resulting in a fire, endangering the property valued at over \$30,000.00 and the lives of others.

VI.

E. W. Richins, Jr. was discharged for destroying and wrecking transmission gears due entirely, in the opinion of the Company to his lack of experience in driving heavy equipment. Richins was dismissed within the 30 day probationary period of employment under which all drivers were employed.

VII.

John E. Cox was discharged for speeding, within the probationary period of employment, violating a rule of the Company and the speed laws of the State.

VIII.

Van Horn was discharged after 10 days of employment due to the reluctance of this employee to report for work, and expecting the Supervisor to get him out of bed each day. This employee, upon request for reinstatement, was reinstated before any charges were filed, and voluntarily left the employ

of the Company before the Order was issued to reinstate with back pay.

IX.

There was no finding the causes for discharge did not exist, or that they were not just causes for dismissal.

Wherefore, your Respondent submits that even though conversations between employees, without the consent, knowledge or approval of the Company, if in fact it constitute an unfair labor practice, does not constitute a waiver of the Company's right guaranteed by Section 10(c) of the National Labor Relations Act, providing that no order of the Board shall require the reinstatement or allow back pay for employees suspended or discharged for cause.

This Respondent prays upon the record being furnished, the Court review the evidence and testimony taken in connection therewith, and the petition for enforcement be denied.

Dated at Phoenix, Arizona, this day of March, 1955.

Respectfully submitted,

TEXAS INDEPENDENT OIL
COMPANY, INC.,
By LANGMADE & SULLIVAN,
/s/ S. W. LANGMADE,
Their Attorneys

[Endorsed]: Filed Mar. 18, 1955. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

STATEMENT OF POINTS UPON WHICH
PETITIONER INTENDS TO RELY

In this proceeding petitioner National Labor Relations Board will rely upon the following points:

1. Substantial evidence on the record considered as a whole supports the Board's conclusion that respondent interfered with, restrained, and coerced its employees in violation of Section 8 (a) (1) of the Act.

2. Substantial evidence on the record considered as a whole supports the Board's conclusion that respondent discriminatorily discharged employees Van Horn, Cox, Richins, and Almada in violation of Section 8 (a) (1) and (3) of the Act.

Dated at Washington, D. C., this 25th day of March, 1955.

/s/ MARCEL MALLET-PREVOST,
Assistant General Counsel, National
Labor Relations Board

[Endorsed]: Filed Mar. 28, 1955. Paul P. O'Brien,
Clerk.

Before the National Labor Relations Board
Sixteenth Region

Case No. 33-CA-230

In the Matter of Texas Independent Oil Company,
Inc., and International Brotherhood of Team-
sters, Chauffeurs, Warehousemen and Helpers
of America, Local Union No. 310, AFL.

TRANSCRIPT OF PROCEEDINGS

Grand Jury Room 304, U.S. Postoffice and Court-
house Bldg., Tucson, Arizona, Tuesday, October 6,
1953.

Pursuant to notice, the above-entitled matter
came on for hearing at 10:00 o'clock a.m.

Before: David F. Doyle, Trial Examiner.

Appearances: Allen P. Schoolfield, 300 W. Vickery
St., Fort Worth, Texas, appearing on behalf of
General Counsel. Howard D. Grant, 267 S. Stone
Ave., Tucson, Arizona, appearing on behalf of the
International Brotherhood of Teamsters, Chauff-
eurs, Warehousemen and Helpers of America,
Local Union No. 310, AFL, the charging party.
S. W. Langmade, 303 Phoenix Natl. Bank Bldg.,
Phoenix, Arizona, appearing on behalf of Texas
Independent Oil Co., Inc., the respondent. [1*]

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* Page numbers appearing at top of page of original Reporter's
Transcript of Record.

(The documents heretofore marked General Counsel's Exhibits Nos. 1-A through 1-L, for identification, were received in evidence.)

* * * * * [8]

Mr. Schoolfield: Now, counsel for the General Counsel at this time solicits a stipulation from the respondent to the effect that the Texas Independent Company, respondent herein, is engaged in commerce under the Act.

Mr. Langmade: The respondent will so stipulate.

Trial Examiner Doyle: It is so stipulated.

Mr. Schoolfield: Now, if the Examiner please, the counsel for the General Counsel wishes to move to amend the complaint at this time, Paragraph 5, to include under the name of Harry Almada, the name of Kenneth Van Horn; the date, May 12, 1953. [9]

I should also move to include Sidney Bailey, S-i-d-n-e-y B-a-i-l-e-y, July 6, 1953.

I should also move to include the name of Lloyd Hinds, L-l-o-y-d H-i-n-d-s, date, October 1, 1953.

To further amend paragraph 5, I wish to insert that respondent laid off or discharged Chester Robinson, C-h-e-s-t-e-r R-o-b-i-n-s-o-n, on or about September 4, 1953, for six full days, reinstating said Robinson on September 10, 1953.

I should also like to include the following:

Respondent laid off Robert Dayton, R-o-b-e-r-t D-a-y-t-o-n, on or about September 8, 1953, for two full days, reinstating said Dayton on September 10, 1953.

I should also like to include the following:

Respondent also laid off Merrill Nutter, M-e-r-r-i-l-l N-u-t-t-e-r, Alfred Jenson, A-l-f-r-e-d J-e-n-s-o-n, Howard Saner, H-o-w-a-r-d S-a-n-e-r, Wesley Parker, W-e-s-l-e-y P-a-r-k-e-r, and A. E. Buchanan, B-u-c-h-a-n-n-o-n, on or about September 9, 1953, for one full day, reinstating these men on September 10, 1953.

General Counsel at this time further moves to amend for clerical errors, paragraph 8 g which reads at this time, "On or about March 2." I wish to strike "March" and amend it to "May 2", as it will now read, "On or about May 2, 1953."

I further move to amend paragraph 8 i for a date. It reads at this time, "April 14, 1953." I wish that to be amended to read, "April 12, 1953." These last two amendments, if the [10] Examiner please, were typographical errors.

Trial Examiner Doyle: Mr. Langmade, I will hear you at this time.

Mr. Langmade: If the Examiner please, we have no objection to the amending of g and i on typographical errors.

Trial Examiner Doyle: All right. The complaint is amended in those two particulars as to the dates.

Mr. Langmade: We do, however, seriously object to the amending of paragraph 5 to include additional names as set forth by counsel, for the reason that respondent is not prepared to answer these charges. This complaint is a formal complaint and a formal answer is required, and respondent prepared its case with that in mind and not on the theory of coming into court and adding what you

might call an additional parties plaintiff to this complaint.

I would like to point out in particular "Kenneth Van Horn, May 12," which is earlier than any other charge in paragraph 5, and certainly the National Labor Relations Board could have or should have had knowledge of that charge rather than, let me say, going around and trying to find additional people to put in paragraph 5 after the case had been set for formal hearing.

I further object to the inclusion of the gentlemen that counsel says were laid off and then reinstated. As I understand it, one of the charges here is that these men were discharged because they belonged to a labor organization. It seems to me [11] the charges are certainly being refuted by the fact that the men were laid off and then put back to work. The charge is that they were fired because of their activities in the labor organizations.

Trial Examiner Doyle: Mr. Langmade, I think there is a good deal of merit to some of your objections, and I do think the respondent is entitled to know what the charges are before he comes to the hearing; however, we are in this position, that we can't adjudicate the matter, some of these discharges at this time, and let others go. What we would like to do, the Board, and it is the policy of the Board to try to adjust these matters and adjudicate these matters once and for all when we do have a hearing. So I am going to permit the amendments as moved by the General Counsel, and the complaint is amended in accordance with my

predecision in order, and I will also state to you, Mr. Langmade, that on our off-the-record discussion of a few moments ago, counsel seemed to think we might finish this case by tomorrow. I am going to say that I will give you some additional time, if you request it, when we get near the end of the case, if you find it will give you a chance to put in a defense to these matters which you regard as new, I will give you some additional time on Thursday or Friday morning, if that would be of any assistance to you.

Mr. Langmade: That being the Examiner's ruling, we will do our best to comply. [12]

* * * * *

Mr. Langmade: There is one fundamental question I would like to ask the Examiner before we proceed in this case, and that is assuming that these gentlemen and the Examiner find that these men were interrogated as to union affiliations or non-union affiliation, then does it follow that a man cannot be discharged for cause, or in the event that the respondent does show that there was cause for the firing of this man, and the Examiner also finds the same thing, then would the finding then be merely that the respondent was wrong in interrogating these employees as to whether they were union members or not? [13]

* * * * *

HARRY M. ALMADA

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Doyle: Will you give us your full name and address.

The Witness: My name is Harry M. Almada. I now live at [15] Wickenburg, Arizona, and for an address, I do not really know, since we just moved into this house, other than I believe the street is Jefferson.

Trial Examiner Doyle: Well, will Wickenburg, Arizona, get you?

The Witness: General Delivery.

Trial Examiner Doyle: All right, General Counsel.

Q. (By Mr. Schoolfield): Mr. Almada, where were you employed prior to June 3, 1953?

A. I was employed by Texas Independent.

Q. Texas Independent Oil Company?

A. Oil Company.

Q. What were your duties with that company?

A. To drive from Lordsburg to El Paso and back to Lordsburg.

Q. To drive over-the-road rigs, is that what you drove, big trucks?

A. Trucks and trailers.

Q. Diesel trucks? A. Yes.

Q. What was your principal product that you hauled? A. Gasoline.

(Testimony of Harry M. Almada.)

Q. Gasoline——

Trial Examiner Doyle: These were tank trailers, were they not?

The Witness: Tank trailers, tank trucks and tank trailers. [16]

Q. (By Mr. Schoolfield): Did you often haul an extra trailer with your regular trailer?

A. No, just the two units coupled up, the truck and the trailer.

Q. I see. Now, Mr. Almada, would you tell the Examiner when you first spoke and the first conversation you had with a representative of the Texas Independent Oil Company, and when you first went to work, if you recall.

A. My first meeting with an agent of the Texas Independent was on April 11, and that was on a Saturday I believe, around noon or shortly after.

Q. Of this year, 1953? A. 1953.

Q. Would you go ahead and tell the Examiner who this man was that contacted you and what he said to you.

A. It was Mr. Quisenberry, and he was brought to my house by a fellow by the name of Bill Williams who drives for McNutt Oil Company, also out of Lordsburg to El Paso, or not quite into El Paso but to the outskirts of it and back to Lordsburg.

Bill Williams, knowing that I was out of a job, was interested in me getting work. Mr. Quisenberry was looking for drivers. They hadn't started working through there yet but they were planning the

(Testimony of Harry M. Almada.)

operation. And he came to my house with Mr. Bill Williams, of course, and asked me if it was true that I was looking for a job, which I said yes. Then he said that he was starting [17] out a new operation from Lordsburg back to El Paso and back hauling fuel and would I be interested in a job, and I said I sure would. He questioned me as to whether I belonged to the union or not. I said that I had a union book fully paid and in good standing and that I was in the union. He said, "Well, that lets you out, because I am not hiring any union men. I am hiring all non-union men because I don't want a union outfit." He said, "I don't want no trouble with the union and I don't want to be hampered or delayed in any way by the union." I said I was sure sorry but I would tell the truth because I didn't want to start and go a month or so—if I went to work with Texas Independent, I wanted a long-term job and not one that would strand me right away."

"Well," he said, "the old man would not put up with it." Right after that I found out who that was. Anyway, he said the old man would not put up with it. He said he would only let me—tell me later on that I would have to go. He said, "There is no use in putting you on," and I said that I was sure sorry because I needed the job.

Then he suggested I drop my union book and withdraw and I could work like that. And I said I would do that if it would get me the job. He said if I would promise not to instigate any union ac-

(Testimony of Harry M. Almada.)

tivities on the job and off the job and solemnly promise to stay out of any kind of trouble like that, anything that would create trouble between the union and Texas Independent, [18] that I could have a job as long as I wanted it. And I said I would swear not to ever instigate union activities as long as I could have the job, and I said I would keep my word about it. And he said, "Fine, you have a job as long as you want it." And he said, "You will probably start right about Wednesday." And he left shortly after that and Bill Williams and another driver came in when we started this conversation, George Basilvaso, I believe the fellow's name was—I believe it is spelled B-a-s-i-l-v-a-s-o.

Q. Is that George Basilvaso? A. Basilvaso.

Q. All right.

A. Anyhow, they heard this conversation and they left shortly after Mr. Quisenberry, and we talked a little after Quisenberry left.

Q. You and these other fellows talked?

A. Yes.

Q. Well, we wouldn't be interested in that unless the Examiner wants to hear it.

Trial Examiner Doyle: No, I think it would be improper.

Q. (By Mr. Schoolfield): Now, Harry, when did you next hear from Mr. Quisenberry; would you tell the Examiner when?

A. It was on Monday at about 7:30 or 8:00 o'clock in the morning. He called me, and I think

(Testimony of Harry M. Almada.)

it was on April 13. He called me and told me, "Harry, I have got a truck waiting for [19] you here." And I wasn't waiting for anything on Monday because he had said before that it would be on Wednesday, which I told him I would get ready and get breakfast and come right on down and take it out. Well, when I got out to the Dixie Truck Stop, he was there with his truck. It was a Sterling diesel and the number of the truck, I believe, was No. 9. And he was waiting for me there and he said he would test hop me. He said he would drive with me from Lordsburg to El Paso and then get a plane and fly back to Phoenix, which he did. We got the truck checked and started. And as far as going with me to El Paso, he then changed his mind and came back to Lordsburg with me.

Q. How far did he test hop you then, Harry?

A. From Lordsburg to El Paso and back to Lordsburg.

Q. Now, on that trip, did you and Mr. Quisenberry talk about the union?

A. Yes, he told me about his views about why he didn't want the union in on the deal there. He told me that at one time he had belonged to the union and he said that he was of a progressive nature and that the union had held him back at one time or the other and he finally started working without the benefit of the union and since then he had gone up. He said, "We can run this as a good deal here without any need of the union." He talked about other things, but some of them prob-

(Testimony of Harry M. Almada.)

ably wouldn't have any bearing on the case at all, about freighting——

Q. You talked about your jobs, too? A. Yes.

Q. All right. Now, Harry, you testified you started to work for Texas Independent around April 13 of 1953 and that you made over-the-road runs usually from Lordsburg to El Paso and in that general vicinity: is that correct?

A. That is correct.

Q. Now, when you made these runs, would you tell the Examiner what instructions you had on the speeding or the speed limit or the speed you were supposed to go over the roads.

A. Well, we talked quite a bit about that, too. Some of it I requested that we talk about and some of it I questioned.

Q. Who is "we"?

A. Quisenberry and I.

Trial Examiner Doyle: When did this conversation take place?

The Witness: It was in the truck while we were moving on the way to El Paso and back.

Trial Examiner Doyle: When you were being tested?

The Witness: That is right.

The question was "speed", what speed would be permissible by Texas Independent. And he told me, "Well, if you don't overdo it, 50 to 55 unless requested to do otherwise," and he said nobody sees these charts but him. The chart is the thing that records all the happenings on a trip inside of the clock.

(Testimony of Harry M. Almada.)

He said that nobody sees these charts but him so there was nothing to worry about on that score. However, he said, "I don't want you fellows to absolutely take over and violate all kinds of laws, but there might be some times when——"

Q. (By Mr. Schoolfield): Harry, did Mr. Quisenberry ever instruct you to pull the chart and speed the truck to make a run?

A. Yes, on several occasions right there at Lordsburg, right there he would come in either with a truck or just a little ahead of the truck, and most of those trucks at that time were running late. The refinery closed at 8:00 o'clock at night. They closed the gates at that time.

Q. What refinery is this, Harry?

A. The Standard Oil Refinery in El Paso. That was the deadline. We had to get in before that time. We also had to "goat" the trailer at the state line of New Mexico just before you go into Texas and then "goat" this trailer to within the city limits of El Paso, Texas, which when we get it in the city limits of El Paso, we would hook it up. So all of that was just work that took time away from our driving time, see, and all of these trucks were coming in rather late, around 4:00 o'clock and maybe a little after. Some of them were as late as 4:15 and 4:20. But even 4:15 was rather late to make a standard schedule from Lordsburg to El Paso and get there in time to load before they closed the gates. So we would be told—at first he started by telling us to just go ahead and throw the chart

(Testimony of Harry M. Almada.)

away. He said, [22] "Get this truck loaded regardless." Well, we knew what he meant so we would throw the chart away and take off and disregard state laws, city laws and everything else, and the main thing was to get that truck—

Mr. Langmade: Just a minute, I object to that unless he states what state laws and city laws were being violated.

The Witness: From speed.

Trial Examiner Doyle: Just a minute, I don't know whether that is a conclusion of the witness or not. The way he testified is a little confusing. Let us find out what was said in regard to state laws.

Q. (By Mr. Schoolfield): Harry, I will ask you this question: Were you ever told personally by Mr. Quisenberry to ignore your chart?

A. Yes, he did.

Q. And would you tell the Examiner approximately when that was said to you and how often, if you can recall?

A. Well, at the beginning there just about every trip, because they were all coming in late.

Q. I see.

A. And it started out, like I said at the first, to ignore the chart, to tear it out and throw it away. Later it came to ignore the chart but not throw it away.

Q. Leave the chart in the truck, turn the chart in but to ignore it as far as speed? [23]

A. That is right.

(Testimony of Harry M. Almada.)

Q. In other words, to get that truck down and get it loaded and get it back and get it to that gate at the refinery in El Paso before it closed?

A. Before it closed.

Trial Examiner Doyle: Now, the record isn't very clear on that. I don't think the record is very clear on that. Now, this chart you are referring to is a tachometer chart that shows the speed at which the truck is being driven; is that right?

The Witness: That is right.

Mr. Schoolfield: Is the Examiner clear on the "goat" proposition in El Paso?

Trial Examiner Doyle: No.

Mr. Schoolfield: Would the Examiner like me to explain it?

Trial Examiner Doyle: I think we had better.

Mr. Schoolfield: The "goat deal" at El Paso is a little shift truck that hauls the trailer across the City of El Paso to the refinery. The boys in the truck—now, I stand corrected—drive these trailers to the city limits of El Paso. There they must drop their trailer and have the thing goated across to be in conformance with the El Paso city laws, is my understanding.

Trial Examiner Doyle: What is the goat part of the deal?

Mr. Langmade: If I may explain it this way, Texas is, for reasons which are more or less commonly known—has more or less restricted the length of trucks. New Mexico, Arizona and [24] California more or less have a standard length limit

(Testimony of Harry M. Almada.)

of trucks and trailer, which is around 65 feet. Texas has a law that no truck and trailer can exceed 45 feet in length. Therefore, when the truck goes over the New Mexico line into Texas, the trailer has to be taken off. The trailer with the main tank comes in by itself. A stub diesel, as they call the goat, then hooks on to the trailer and brings it to the El Paso city limits. Now El Paso city limits does not object to trailers, trucks and trailers of 65 feet in length. Therefore, the minute you get into the city limits, the truck and trailer is then hooked up and taken to the refinery and back to the end of the city limits, and that is a distance of about three or four miles that all this commotion goes on in.

Mr. Schoolfield: It is a time-consuming operation, I take it.

Trial Examiner Doyle: That is substantially a correct statement of what this goat thing is?

Mr. Schoolfield: Yes, sir.

Trial Examiner Doyle: It is not only myself who has to understand it, some day somebody in Washington will read about this and I wouldn't want them to be puzzled about it.

All right, gentlemen, proceed.

Q. (By Mr. Schoolfield): Now, Harry, while you were working for the Texas Independent, did you have any additional duties or did Mr. Quisenberry use your house for an office, or anything of [25] that nature, would you tell the Examiner that?

A. He began to use my house as an office there

(Testimony of Harry M. Almada.)

in Lordsburg and he done all his long-distance calling from there to this office in Tucson, or for receiving orders from his office in Tucson or calling El Paso if he needed to, and just a general place to go and carry on business. I rather thought he just used it like an office.

Q. Did he ever call you to relate messages to the other drivers?

A. Yes, sir, he called me several times and asked me to relay messages to the other drivers.

Q. Did you have any additional authority or any other authority above that?

A. No, no authority other than from the very beginning he started by asking me to kind of look out for things on that end. And later on it turned out that he wanted me to be the overseer on that end. He wanted one other fellow that started just ahead of me to oversee on the west end and me on the east end, which job I didn't like.

Q. What did you tell him when he asked you to do this?

A. I just wanted to drive.

Q. You refused to act as an overseer?

A. At first, yes, I didn't want any part of that because it would get me in bad standing with the other drivers.

Q. Did you ever hire or fire? [26]

A. No. I just recommended, because there was one or two fellows that I liked and wanted to help and——

Q. In other words, you brought some drivers to him once in awhile and he hired them?

(Testimony of Harry M. Almada.)

A. Yes.

Q. Do you know of your own knowledge whether all the rest of the boys did the same thing?

A. Oh, yes, some of the other fellows right there in Lordsburg driving to El Paso did so, too.

Q. Now, Harry, would you tell the Examiner if you have ever had a discussion with Mr. Quisenberry concerning E. W. Richins, Jr., and when this conversation took place.

A. Well, Richins went on the job and we have never had any conversations of any kind about Richins until Richins was fired.

Q. Now, Richins was fired on May 25, 1953. Now, can you tell the Examiner when you had a discussion with Mr. Quisenberry on Mr. Richins?

A. Well, it was right after that and it was kind of a blow to me because I had heard nothing about him being in trouble.

Q. Now, right after that, what do you mean by that?

A. We met at Dixie, at the Dixie Truck Stop.

Q. How long after that?

A. I would say it was just about three days, maybe four days after that. It wasn't too long after he was fired.

Q. Yes. [27]

A. It wasn't too long after he was fired that I heard that Quisenberry was in town, and I went on down to the truck stop and he was there. So we sat at this counter and he talked to me. There was one other there present at the time.

(Testimony of Harry M. Almada.)

Q. Who was that?

A. Herschel Bevins or Beson.

Trial Examiner Doyle: Will you spell that?

Mr. Schoolfield: Beson, B-e-s-o-n.

Mr. Langmade: It is B-e-e-s-o-n.

Q. (By Mr. Schoolfield): Now, what did Mr. Quisenberry say to you about Mr. Richins at that time?

A. He said that Bill Richins was a good fellow and he hated to let him go but he was too thick with his cousin Art Richins and that he was poking union ideas into his head and that Bill Richins would vote completely against him, so he had to let him go.

Q. What did he say about voting, would you repeat that?

A. He said that Bill Richins would vote in favor of the union, meaning against him, he would vote in favor of the union and that he had to let him go.

Q. Now, Harry, did you have any other conversation on the subject of Mr. Richins?

A. Well, at the latter stage, he came to my house to use the phone.

Q. How much of a later date? [28]

A. Well, days after that.

Q. How many?

A. Maybe two or three days after that he was at the house again.

Q. I see, after you talked to him at the truck stop.

A. At the truck stop.

Q. What did he say then?

(Testimony of Harry M. Almada.)

A. He repeated the same things almost word for word. He said he sure hated to let Bill Richins go because he was a good man but that Bill Richins was too thick with Art Richins and they were seen frequently in all these truck stops, in all these truck stop cafes downtown together and he figured that Art Richins was poking union ideas in his head and would cause him trouble later on by voting for the union.

Q. All right. Harry, did you ever have a conversation with Mr. Quisenberry on the subject of Johnny Cox? A. Yes.

Q. Tell the Examiner when and where you were and who was present, please.

A. Oh, I would say just a few days before he let Bill Richins go he was evidently worried, getting worried about everybody, and it was right in front of my house just after we got out of our cars, and he asked us to——

Q. Who is "us"?

A. Bill Richins and me. [29]

Q. You and Bill Richins were together?

A. Were together, and Mr. Quisenberry told us why he let Johnny Cox go. He said when Johnny Cox applied for a job he asked him if he was in the union, "I said, 'Have you ever carried a book or got a book now,' and he said, 'No.'" So he gave him a job on the strength of that. And a few days after that, Johnny Cox borrowed \$20.00 from Mr. Quisenberry, which Mr. Quisenberry loaned Johnny Cox the \$20.00. And he said later after that when

(Testimony of Harry M. Almada.)

he found out that he carried a book all the time and was in good standing with the union that it made him so mad that he had a fellow that was in the union, and he let him go. And he said, "I fired him because he could cause me trouble later on."

Q. Now, would you tell the Examiner whether or not you had a conversation with Mr. Quisenberry concerning yourself and your union activities around the middle of May 1953.

A. He called me.

Q. Will you tell the Examiner where you were.

A. I was at home, and I would say it was between 7:00 and 8:00 o'clock at night in the evening, and he called me and said that he was on a spot, that the old man, meaning, I guess, Horace Steele, in Phoenix, was mad at him and told him to get rid of a certain man because he was union all the way through. He said he asked him who was that and he was told that it was Harry Almada in Lordsburg. He said, "I don't want him on; I want him [30] fired." Quisenberry said, "I am in a terrible spot——"

Mr. Langmade: Just a minute, was this conversation in front of Quisenberry or is it something that the men told you?

The Witness: He told me.

Mr. Langmade: You are relating questions or statements that Quisenberry made to you?

The Witness: Yes.

Q. (By Mr. Schoolfield): It was a telephone conversation?

(Testimony of Harry M. Almada.)

A. Yes, and he said the only thing that he could do, he said, "You take your withdrawal card and send it back to Fred Bone and tell him we want no part of the union." I said that I couldn't do it. He said, "Well, by George, there is nothing else you can do. It is either that or else." I said, "Look, I have kept my word with you throughout this thing and I haven't created any union activity of this kind and you are firing me now." He said, "Fred Bone told me that you were a staunch union supporter and that you was ready, the minute he gave the word to go, you were ready." In other words, that I would follow whatever the union told me to do. I asked him to give me a little time to call Mr. Fred Bone in El Paso, because Fred Bone gave me the word of honor—gave me his word of honor that he would never interfere with me in any way whatsoever because he knew I needed my job awfully bad. So I called Mr. Bone in El Paso and I questioned him about that, and Mr. Bone told me he had never seen Mr. Quisenberry, he didn't know him from Adam, [31] had never talked with him over the phone or otherwise, so then I called Quisenberry back again and I told him about my talk with Bone, and he said, "Well, I am sorry, but I have to do something to tie my men in on one side of the fence or the other," and I said, "Well, I can't turn loose of my withdrawal card. I will need that one of these days and I will be sorry if I don't have it." He said, "Either that or else." And I told him, "Well, you do whatever you

(Testimony of Harry M. Almada.)

think is right." So then Mr. Quisenberry said, "I am going to Phoenix tomorrow and I will talk with the old man, and then I will be back and call you and let you know one way or the other." He said, "Meanwhile I will sustain your schedule for tonight. You are not to work tonight." I told him that it was all right, and I went downtown waiting for the fellows to come in.

Q. That is after the conversation, you left the house?

A. After the conversation, yes. In other words, he hung the phone up. I was pretty well disgusted and I went downtown. And I decided I would talk with the drivers and see if they could tell me anything.

Q. You made your run that night, anyway, didn't you?

A. Yes, well, my breaking partner brought my truck in anyhow, which decided me, because I wasn't expecting to run that night. And I asked him, rather I told him I was not supposed to run and he said, "It is all right, I have everything fixed up."

Q. Well, you went on working. This was around the middle of [32] May, was it not?

A. Just about the middle of May.

Q. And then you continued working on until the day you were discharged; is that correct?

A. Yes, sir.

Q. Now, let's see. Now, did you ever have a conversation with Mr. Quisenberry in the presence of

(Testimony of Harry M. Almada.)

another in which Mr. Quisenberry asked you anything about voting? Would you tell the Examiner about that.

A. Yes, there was one night right in front of our house when Bill Richins and I were together and he talked to both of us. He first asked Bill Richins, "This is none of my business, really, and I shouldn't ask, but I would like to know just how you are going to vote. Would you vote against me?" Bill Richins thought right quick and answered, "I will not bite my nose to spite my face." Then Mr. Quisenberry turned and asked me the same question, and I told him what I told you from the very beginning still goes, meaning that in our talks I had told him I was union and that I would not instigate union activities but whenever the votes were cast and the majority were ready to go union, I would go with them because I already was union, and that was what I meant by that.

Q. Now, Harry, can you place the day of the month and the month that this conversation took place a little better for us, please? [33]

A. It is so long ago now that I can't think of all those dates exactly.

Q. Not necessarily the exact date, Harry.

A. It was in May sometime before Bill Richins got fired.

Q. A few days before?

A. I would say a few days.

Q. Two or three days before? A. Yes.

Trial Examiner Doyle: May I interrupt a min-

(Testimony of Harry M. Almada.)

ute? Was there some election coming up at the time?

Mr. Schoolfield: Mr. Examiner, I stand corrected by respondent's attorney on this. There has never been an election, but it has been talked of a consent election, which has never been consummated.

Trial Examiner Doyle: I thought there might have been some date on which an election was coming up and it might have some reference to these conversations, but if there was no date set for an election, or anything of that sort, it will have to stand just the way it is.

Mr. Schoolfield: The union had petitioned the Board sometime in May. I have the exact date here, for an R petition representation.

Mr. Laumade: Perhaps I can explain it this way. The union filed with the Board a consent to have an election. Thereafter in due course Texas Independent, the respondent, filed their [34] consent to have the election, but on the day or the day before we filed our consent, the union withdrew their consent to have an election. Therefore, the charges were pending and we were advised that there couldn't be an election without the consent of everyone. Thereafter, approximately three weeks ago, the union again consented and filed another consent to have an election, and the day after that, this respondent did receive notice that this hearing was to be held today and therefore we withheld giving our consent until now. Our consent now is

(Testimony of Harry M. Almada.)

at night I went to the Dixie because I had to fuel there. I stopped there and I had to wait there because there were three trucks ahead of me.

Q. The Dixie Truck Stop is in Lordsburg?

A. That is right. And I had to wait until they fueled three other trucks because there was only one diesel fuel pump there. And I was delayed almost two hours there awaiting my turn to get in at the pumps. They had been putting pressure on us for taking too long, and they even talked about they had to either cut the mustard or else, meaning they either had to bring the schedule in on time or they would be replaced. I was getting a little afraid because I had almost been fired at one time. And I was trying to make up for lost time when I left there and I was thinking about the fellows coming into the refinery ahead of me.

Q. Let us shorten this thing. Now, you made your trip; is that correct? A. Yes.

Q. Now, when did you talk to Mr. Quisenberry about it?

A. Well, I made my trip and I talked to Mr. Quisenberry when [37] I got back.

Q. What did you say to Mr. Quisenberry on the phone?

A. He called me to tell me we was moving into El Paso. He wanted us to be there, I believe he said, Monday morning. It was Sunday morning or Monday morning at 3:00 o'clock in the morning. And I told him, "All right, I will be there." And then when he got there giving me these orders,

(Testimony of Harry M. Almada.)

I said, "I have got something to tell you." And I was kind of half kidding because I didn't think he would fire me for something like that. I said, "I burned a tire on the road, I hope it doesn't get me into trouble." So he said, "Well, I will see the tire when I get into Tucson." And I told him where it happened and I told him how it happened. The tire went flat while rolling and I stopped, took the wheel off, went for my fire extinguishers—I had two, both of them dead. I took the tire off of the wheel, left it in the desert and went on in with my wheel on the spare tire rack. On the way back I got the tire and cradeled it back on the tongue of the trailer so he could see it. He said again, "I will see the tire when I get into Tucson."

Q. Did you say anything more to him in this conversation, Harry?

A. No, that just about wound it up there, but he called back again.

Q. Now, when did he call you back?

A. About midnight that night. [38]

Q. Now, what was this, June 2nd or June 3rd?

A. It was the night of the 3rd.

Q. All right, what did he say when he called you back at midnight?

A. He said, "Harry, I can't have fellows burning tires up and down these roads." He said, "George Wallsmith is going to take your truck. I am just going to have to let you go." I said, "That is all right." I wouldn't argue with him.

(Testimony of Harry M. Almada.)

Q. That is all that was said on that conversation?

A. That is right.

Q. That was the day you were discharged?

A. That is right.

Q. Let me get this straight, Harry. You had a conversation with him of how many hours before the conversation when he discharged you?

A. Well, he called me about 7:30 or 8:00 o'clock on June the 3rd and called me back around midnight on June the 3rd or early in the morning hours—I would say at 12:00 o'clock or about 12:00 o'clock so it would be early June the 4th or late June 3rd.

Q. Where was Mr. Quisenberry when he called you?

A. I would say he was right there in Lordsburg.

Q. How long have you been driving a truck?

A. All my life except five years in a mine and two or three years in a used car lot.

Q. How many years would you say offhand you have been driving [39] a truck?

A. Somewhere between 15 or 16 or 17 years.

Q. At this time would you explain to the Examiner just what burning a tire is. Does it happen often?

A. Burning a tire happens when you have a tire go flat while rolling. You wouldn't know of it because there is no way you can hear it go flat. As a rule, it will happen far away enough from you, motor noises and all, that you won't hear it.

(Testimony of Harry M. Almada.)

Q. Unless it blows?

A. When it blows, you would know about it. It is very seldom that you fail to hear it. But when it goes flat while you are rolling, there is no way you can tell.

Q. Have you ever been fired before for burning a tire? A. Never.

Q. Have you ever heard of anybody being fired for burning a tire? A. Never.

Trial Examiner Doyle: Let me get this straight. You say that you don't notice if a tire goes down. Is that because they are dual tires on these wheels?

The Witness: They are dual tires.

Trial Examiner Doyle: So the weight is taken off by the other tires and you don't know it?

The Witness: That is right. Sometimes if you are loaded, you have a chance there, because the load will knock the one tire [40] down enough and it will knock the rim off the flat one and it will make a noise, but when you are running empty like I was that night, the one holds the other one up so well that the rim doesn't even kick off. The ring itself that holds the tire does not fall out of the wheel there.

Trial Examiner Doyle: Mr. Witness, you are going to have to take it a little slower so the reporter can get it.

The Witness: Yes, sir.

* * * * *

Cross Examination

Q. (By Mr. Langmade): Mr. Almada, I believe

(Testimony of Harry M. Almada.)

you testified that [41] you had been driving trucking equipment for approximately 15 years.

A. That is right, about that much.

Q. And had a great deal of that time been spent with heavy equipment such as Texas Independent Oil Company had?

A. A good portion of it, yes.

Q. And you are familiar with that type of equipment? A. Yes, sir.

Q. And you are also familiar with approximately the cost of the equipment, are you not?

A. Yes, I am.

Q. And you are more or less familiar with the rules and regulations that various trucking companies lay down to their employees, are you not?

A. Yes, sir.

Q. And you are also familiar with the way a truck operates? A. Yes, I am.

Q. And I will ask you whether or not, and I understand this is the common expression, whether or not in your course of employment over the years, whether or not you ever did what they call bumping tires? A. Yes, I have.

Q. And what generally is the time and place—when and where do you bump your tires—and would you explain to the Examiner what bumping tires means? [42]

A. Bumping tires is going around and either kicking your tires with your heel or toe of your shoe, or to use a metal tool of some kind to hit these tires to see that they are up and full of air.

(Testimony of Harry M. Almada.)

Q. Now, what is the general practice relating to bumping tires? How often do you do it?

A. Anywhere from 60 to 80 miles.

Q. And that is the general practice throughout the industry?

A. Different companies—companies that work on a standardized operation will give you that rule themselves. We don't have to guess or anything. They will tell you what they want you to do.

Q. But that is the standard practice?

A. Yes, it is with companies that work on a standard operation.

Q. Were you informed by Mr. Quisenberry that in working for the Texas Independent Oil Company you should bump your tires?

A. We had a lot on that but he changed so much that it was doubtful——

Q. Just answer my question. Did Mr. Quisenberry ever instruct you to bump tires?

A. He said to bump tires about every 60 miles.

Q. And did you have more or less specific places where you bumped your tires?

A. We used to stop at Deming and Las Cruces and bump our tires there.

Q. And also at Wilcox? [43]

A. I never went through Wilcox with Texas Independent.

Q. And how far out of Deming, New Mexico, were you at the time that you stopped and bumped them?

(Testimony of Harry M. Almada.)

A. I would say between 15, 16, 17 miles this side of Las Cruces when the tire went down.

Q. How far is that from Las Cruces?

A. On the other side of Deming.

Q. Las Cruces is east of Deming, is that correct?

A. East of Deming, going towards Las Cruces.

Q. Now, you knew what these trucks carried, did you not? A. Yes, sir.

Q. What was it?

A. It was empty at the time.

Q. And when you went full, what was that?

A. It would be gasoline.

Q. And you know that gasoline is very volatile?

A. Yes, I do.

Q. And in the event a tire is flat for an extended period of time, what happens?

A. It will smoke until you stop. If you stop and you lift your wheel with a jack and lift it up in the air or leave it set for too long, then it will catch fire. The fire is not there, it is smoking—I mean there is no flame as long as you roll; it just smoulders.

Q. But the minute you stop—— [44]

A. You have got to take the tire off.

Q. Immediately? A. Immediately.

Q. Now, when you are rolling empty, approximately how long does it take for a tire to heat up?

A. Well, that is hard to answer because it has been known in the heat of the day if you are traveling in the daytime, in the heat of the day it could be 10 miles, it could be five miles, five or ten miles.

(Testimony of Harry M. Almada.)

At night it could be anywhere from 10 to 15 miles if you are traveling fairly fast.

Q. Did you bump your tires at that time?

A. I bumped my tires when I left Lordsburg and they were all up.

Q. And how far away was Lordsburg from where you stopped?

A. Right about at that 80-mile point.

Q. Then you hadn't bumped your tires for a period of approximately 80 miles?

A. No, I hadn't.

Q. And you are familiar with the fact that the equipment is expensive equipment that you were driving?

A. Yes, I am. [45]

* * * * *

Q. Isn't the reason that you left this tire at the side of the road because it was too hot to put on the rack?

A. It was smoking and it would be dangerous to put it on the rack.

Q. And that was the condition of the tire.

A. There was nothing else I could do but leave it there. The fire extinguishers were dead and I had to leave it.

Q. In other words, it was hot enough to where it was ready to catch on fire, in your opinion?

A. If I had left it there, it would have caught fire, which it didn't it just smouldered.

Q. Didn't there come along two trucks and help you?

(Testimony of Harry M. Almada.)

A. There was a Western truck stopped first and then two of Texas Independent's.

Q. Didn't they ask you whether or not you had a fire extinguisher?

A. I don't believe they had one.

Q. Answer my question.

A. No, we was worried about the fire and I knew if they had a fire extinguisher—you don't have to ask for water if there is [46] a fire. If you have water, somebody will bring it out.

Q. I am asking your opinion as to how long this tire had been flat to get it as hot as it was before you stopped, having in mind that you were driving empty, and one other question preliminary to that is, what time of day was it?

A. I would say it was in the early hours of the morning, approximately between 2:00 and 3:00 o'clock in the morning.

Q. Having that in mind, the hour of the morning, the heat of the road, and the heat of the tire, how long would you say you had been driving with that tire flat?

A. Oh, I would say that that tire went flat and got hot within 15 miles.

Q. Now, Mr. Almada, at the time that you were employed by Texas Independent Oil Company, Mr. Quisenberry knew that you were a member of the union?

A. Yes, I told him so.

Q. And he also knew that you had an active card with the union, did he not?

A. Yes, he did. [47]

(Testimony of Harry M. Almada.)

Q. And then did you recommend, I believe you said, other men? Do you remember who you recommended?

A. I recommended Harry Paine and also Joe Delgado.

Q. Do you know whether or not those men were union that you recommended?

A. I am not too sure on Harry Paine because we never talked too much about it. We was all afraid to talk amongst ourselves about the union. But I was sure of Joe Delgado.

Q. And he hired both of those men?

A. He hired both of those men.

Q. Are either one of them working there now?

A. I believe Joe Delgado is working there now.

Q. And these were men that you were sure did belong to the union? A. That is right.

Q. And you also stated that Mr. Quisenberry more or less asked you to be overseer and take charge of the end of the line where your stop was?

A. Yes, he wanted me to oversee on that end.

Q. And you told him you more or less wanted to be a driver?

A. At first I did, I wanted to be a driver.

Q. Did you feel he had confidence in you and knew your abilities?

A. I believe he must have at that time.

Q. And you think at that time it made any difference to him [48] whether you belonged to the union or didn't?

Mr. Schoolfield: That is a conclusion of law.

(Testimony of Harry M. Almada.)

Trial Examiner Doyle: Overruled.

Q. (By Mr. Langmade): Do you feel the fact that he asked you to become overseer and all of that was affected by the fact that you were a union man?

A. No, it was affected by the idea that I turn in my union book and pull a withdrawal card.

Q. But you had told him that you had always been a union man and would continue to be one?

A. I told him I had been a union man and had a book and if the majority wanted to go union, I would have to go with them because I was already union. You see, a withdrawal card does not throw you out of a union.

Q. I understand that. Have you worked on non-union jobs from time to time in the past over the 15-year period?

A. I have worked for one since I went in the union in 1940, and that was Southern Arizona Petroleum.

Q. How long did you work for them?

A. Oh, I worked for them, I was working really for Mr. Thompson and I believe I put about three or four months there.

Q. Did you keep your union card active during that time? A. I kept my book active.

Q. You kept your book active for how long?

A. All throughout. I have never lost it. [49]

* * * * *

Q. Have you ever seen Horace Steele?

A. I have never talked to the man.

(Testimony of Harry M. Almada.)

Q. Do you know whether or not he would know you?

A. I don't know whether he would or not.

Q. Do you have any reason to believe that he would? A. Not that I know of.

Q. Do you know whether he was in the State of Arizona or New Mexico or Texas during the time that you were employed by Texas Independent Oil Company?

A. By his talks, I gathered he was in Phoenix.

Q. By whose talks?

A. Mr. Quisenberry's.

Q. But you have no reason to believe that Mr. Steele knew you and wanted to fire you, did you?

A. No, we had no time to go up there and find out from him.

Q. So that was merely supposition on your part as to what Mr. Steele personally thought? [50]

* * * * *

. Trial Examiner Doyle: Before you take that up, there is just one question.

I think you gave this answer before, Mr. Witness, how did you come to discover that the tire was flat?

The Witness: Oh, I was traveling on, more or less under good conditions. It was night and it was dark but there was no storm, no clouds or no rain nor nothing to obstruct the view ahead or behind in the rearview mirrors, and there was a car trying to get around me. I later found out it was a woman driving it and when she finally made this pass—now, there was no cars [52] coming from up ahead

(Testimony of Harry M. Almada.)

and nothing from behind except this one woman driver on this one car. She whips out in the left lane as to pass and then all of a sudden pulls back behind my trailer. Well, with time driving you get to where you get suspicious of any movement that is odd, you see, and that struck me as being odd when she whipped back of this trailer, so I started studying her real close in the rear mirror when she came around the second time and when she came around the second time, I couldn't help but see the smoke where it was coming out underneath the trailer and I knew what that meant.

Trial Examiner Doyle: All right, your witness.

Redirect Examination

Q. (By Mr. Schoolfield): Harry, did Mr. Quisenberry ever reprimand you for speeding?

A. He never did.

Q. Did he ever tell you to slow down or anything like that? A. Never did.

Q. Now, you have explained that you bumped your tires at Deming; is that correct?

A. I always have before.

Q. You bumped them at this time—not at Deming, but at Lordsburg?

A. At Lordsburg, yes.

Q. You did not bump them at Deming?

A. No, I didn't. [53]

Q. You were unloaded, you were empty?

A. Empty.

(Testimony of Harry M. Almada.)

Q. And about, what was it, 80 miles from Lordsburg is when you noticed the flat?

A. Approximately, it could be a little less or maybe a mile more, but it would be right around 80 miles.

Q. Did you ever get any printed instructions from Mr. Quisenberry on the length of time which tires should be bumped?

A. No, not exactly. We talked about that but I myself suggested that we check our tires at Deming and Las Cruces, and he said he believed that would be all right.

Q. At Deming and Las Cruces?

A. Yes. But there were other times that that didn't hold because of those mad dashes on the desert to get to El Paso. There was no time for anything, not even such a thing as checking tires.

Q. On these mad dashes you are speaking of to get to the refinery by the time the gates opened, that is what you are referring to, is it not?

A. To get there before they closed the gates on us. [54]

* * * * *

WILLIAM J. JOHNSON

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Doyle: Will you give us your full name and address, please.

(Testimony of William J. Johnson.)

The Witness: William J. Johnson, 2026 S. Amigo, Tucson, Arizona.

* * * * *

Q. (By Mr. Schoolfield): Mr. Johnson, where did you work prior to May 15, 1953?

A. I was working for Slim Quisenberry.

Q. Speak up real loud.

A. I was working for Slim Quisenberry.

Q. You were working for the Texas Independent Oil Company? A. Yes, sir.

Q. What were your duties? A. Driver.

Q. Driving trucks? A. Yes. [55]

Q. Did you drive practically the same type of truck as Mr. Almada has just testified?

A. The same.

Q. Will you tell the Examiner when you first had a conversation with Mr. Quisenberry about your job?

Q. Well, it was down at the 84 truck stop.

Q. What time of the year was it?

A. Around April 25th, approximately.

Q. And what did you say to Mr. Quisenberry at that time?

A. Well, Bill Turner and Al Jenson had requested to talk to Quisenberry about me and I told Bill Turner—well, I followed Bill Turner out to the truck stop. So after they got through talking to him, Turner introduced me to him. So he said, "Where did you drive before?" And I said, "For Western, Cantlay & Tansola."

(Testimony of William J. Johnson.)

Q. Who were Cantlay & Tansola, what did they do?

A. Well, it is a taching outfit with Western Truck Lines. It is all the same, practically.

Q. Go on.

A. Well, Turner introduced me to Quisenberry. He said, "This is the man I told you about." Then he asked me who did I drive for and I told him. He asked me was I in the union and I said yes, that I was in the union. I said, "I have a paid-up book." And he said, "Well, No. 11 is coming down from Phoenix in about three days," and that was just about all the discussion. [56]

Q. And when did you next have a talk with Mr. Quisenberry?

A. Well, I think that was the day I left, Johnny Cox and I went to Lordsburg.

Q. What day was it that you left?

A. I think it was around April 25th.

Q. April 25th you left where?

A. The 84 truck stop out there for Lordsburg.

Q. You saw Quisenberry again on that day?

A. No, it was about three days later.

Q. That you talked to Mr. Quisenberry again?

A. I didn't talk to him then. Our papers were there and Johnny Cox and I left.

Q. You went to work? A. Yes.

Q. When did you next talk to Mr. Quisenberry?

A. Well, I talked to him—I don't know, it was pretty regular.

Q. Did you talk with him about the union?

(Testimony of William J. Johnson.)

A. No. [57]

* * * * *

E. W. RICHINS, JR.

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Doyle: Will you give us your full name and address?

The Witness: Either W. Richins, Box 1175, Lordsburg, New Mexico.

Q. (By Mr. Schoolfield): Mr. Richins, where were you employed prior to May 25, 1953?

A. With the Texas Independent Oil Company.

Q. What were your duties with that company?

A. A truck driver.

Q. Will you tell the Examiner when you were hired and your first conversation with any member of the management when you were hired. [72]

A. My first conversation was with Mr. Quisenberry over the telephone from Lordsburg to Tucson.

Q. About what time of year was that?

A. Oh, it was in the latter part of April, I couldn't say the exact day.

Q. Of 1953? A. Yes, sir, this year.

Q. And what did Mr. Quisenberry say to you over the telephone?

A. He said he would be in Lordsburg in the near future and could I meet him some place for a formal interview for employment.

(Testimony of E. W. Richins, Jr.)

Q. And what did you say?

A. We didn't specify any certain spot, but we mutually recognized each other upon meeting on the street and we went into Bill's Drugstore and carried our conversation on there.

Q. And what did you say in Bill's Drugstore?

A. Well——

Q. What did Mr. Quisenberry say to you after he met you?

A. Well, in the telephone conversation he previously inquired about my union standing and I told him I had a withdrawal card out in 1946 and we discussed the abilities and needs to operate Mr. Quisenberry's equipment, and I later wanted to know why he was interested in my union connections.

Q. Go on.

A. And he specified that he was looking for a non-union crew [73] and that I had been inactive in the union long enough that perhaps he thought he wouldn't have to worry about it. And he promised me the next truck into Lordsburg.

Q. Did he say anything about the scale of pay?

A. Yes, he said he paid better than union scale just to keep the non-union.

Q. Now, when did you have your first run after this conversation?

A. Well, several days passed and I talked to several people and it seemed like he had promised them the next truck, too, so I made a trip in my automobile to Tucson to see Mr. Quisenberry and

(Testimony of E. W. Richins, Jr.)

he said the next truck would come up in a bunch of three, not to worry about it and I would get the next truck.

Q. Now, did you have any discussion about the union with Mr. Quisenberry from that day until the day you were discharged, that you can recall?

A. Not involving me, not that I can remember.

Q. Were you given a test run?

A. I was given, you might say, two test runs.

Q. Who gave those to you?

A. I believe Bill Turner gave me my first one going west and Mr. Almada gave me my second one going east.

Q. Now, were you with Mr. Almada at any time when Mr. Quisenberry requested either of you to give him information about voting? [74]

A. Yes, I was.

Q. Will you tell the Examiner when this took place and what was said.

A. It was in front of Mr. Almada's home in Lordsburg, and there had been some talk——

Q. And when was this, Mr. Richins?

A. Oh, I'd say the 22nd, maybe, of May.

Q. I see.

A. There had been some talk of an election and naturally it was of interest to Slim so he asked me how I was going to vote, and he said, "Well, I shouldn't ask you that, that would be an unfair labor practice," but he says, "how are you going to vote?" Well, I didn't know what to say. I did have a withdrawal card and I didn't want to jeop-

(Testimony of E. W. Richins, Jr.)

ardize it in any way and at the same time I didn't want to jeopardize my job, so I told him I couldn't cut my nose off to spite my face.

Q. All right. Did he say anything else then?

A. Well, I guess it didn't register just then. He turned around and asked Harry and he said he didn't have to ask Harry, he knew what his answer would be.

Q. He turned to Almada and checked himself and said he didn't have to ask Harry, he knew what the answer would be; is that right?

A. That is right.

Q. Did Mr. Quisenberry ever make any statements to you and [75] ask you—did Mr. Quisenberry ever make any statements to you and can you place the time in which he referred to the vote and the job, if there was a vote?

A. I couldn't put a date with it. It was on numerous occasions. If we did vote union, we would vote ourselves out of a job.

Q. Now, he said that to you; is that right?

A. Yes.

Q. And on numerous occasions. Can you give us any reasonable estimate of time during your employment period when he said that to you?

A. Not offhand, no.

Q. But he said it to you many times; is that correct?

A. Well, several times, yes, sir.

Q. Now, will you tell the Examiner the instances it happened to you on May 15, the day of your

(Testimony of E. W. Richins, Jr.)

discharge, and where were you when this happened?

A. It was later than May 15.

Q. Excuse me, May 25th, I'm sorry.

A. Would you repeat that question?

Q. Yes. Where were you when you were discharged?

A. I had gone into the Dixie Drive Cafe on the east side of Lordsburg assuming that my truck would be there. I had no telephone, no means of them getting in touch with me. I just had to be there when the truck was there, or have some way of knowing [76] that it was there. Well, when I got there there were three trucks there, and I walked into the cafe and ordered my breakfast and there were two or three drivers there. I believe there were three drivers there, and I sat there talking to them and pretty soon these drivers decided to take off and each one of them declaring which truck they would take. I was asked which one I was going to take, and I said, "It looks like I am not going to take." There were three trucks out there and three drivers to drive them away. Then Slim told me they had put the pressure on him in Phoenix and he had to let me off.

Q. Did he say anything more about that pressure, what kind it was?

A. No, but I assume that it was probably my union connections, or something of that nature.

Q. Did Mr. Quisenberry ever give you a reason for discharging you?

(Testimony of E. W. Richins, Jr.)

A. Yes, he told me—I had transmission failure about 45 miles east of Lordsburg and it was due to that failure for them laying me off.

Q. Now, when did this transmission failure occur?

A. It was coming into Lordsburg loaded.

Q. And when, what time of the month?

A. I believe the 23rd—no, wait a minute, it was——

Q. Now, take your time.

A. I pulled several runs after that failure. The truck was [77] down three or four days being repaired after it went into Phoenix.

Q. Can you estimate how many days before your discharge you had transmission failure?

A. Oh, probably 15, more or less.

Q. Approximately 15 days?

A. Yes, sir.

Q. And Mr. Quisenberry told you at that time that that was the reason he was letting you go; is that correct? A. Yes, sir.

Q. Now, did you have any further discussion with Mr. Quisenberry after your discharge? Did you see him in town any time after you were laid off or fired? A. Yes, I did.

Q. Will you tell the Examiner approximately when that happened?

A. I believe that was—oh, it was nearly the last of May—no, it was in June.

Q. How early in June?

(Testimony of E. W. Richins, Jr.)

A. It was early in the month, right after they moved the operation to El Paso.

Q. Around the 4th, 5th, 3rd, can you estimate the date? A. No, I couldn't.

Q. Well, it was early June?

A. Early June, yes, sir.

Q. What did Mr. Quisenberry say to you then?

A. He said that he had heard that I had filed charges against [78] him with the National Labor Relations Board.

Q. What did you say?

A. I said I didn't know that I had gone that far. I said I had filed an affidavit with Bill Stratten stating what took place.

Mr. Langmade: I believe I am going to object to that in that what happened after the dismissal has no bearing here. I can't see where it would tend to prove or disprove anything in particular.

Trial Examiner Doyle: Well, I take it that the only relevancy that the conversation would have after the event was to the nature of the admission, or something of that sort. Now, whether they filed charges or not, this man or the union or anyone else, has no probative value. However, I overrule the objection on the basis that I expect there will be something in the nature of a proposed admission.

Mr. Schoolfield: That is correct.

Q. (By Mr. Schoolfield): Would you go ahead with this conversation, now, Mr. Richins, as to what Mr. Quisenberry said to you?

A. Well, Mr. Quisenberry wanted me to with-

(Testimony of E. W. Richins, Jr.)

draw my charges. I said I didn't think I could do either of us any good now by withdrawing those charges at this stage.

Q. Did he say anything about what he would do for you if you did withdraw the charges?

A. He said that if in the event the union put me back to work [79] or made him put me back to work, he would find means of getting rid of me. If nothing else, he would starve me to death. He would hold back my runs.

Q. Is that what he said to you?

A. Yes, sir.

Q. Did Mr. Quisenberry say to you anything about your being eligible for rehire?

A. Yes, he said when he discharged a man he put on their employment application or personnel file, whichever the case may be, whether they are subject for rehire or not. And in my case, he definitely promised me that I was, until I filed charges against them, eligible.

Q. Now, Mr. Richins, during this conversation, can you tell the Examiner where this took place in Lordsburg; where were you?

A. I was coming out of the post office at the time I saw Mr. Quisenberry and he was parked around the corner and we went to his car at his suggestion and sat there and talked.

Q. Did Mr. Quisenberry say anything to you about putting you back to work if you dropped charges?

A. He said I could move to El Paso.

(Testimony of E. W. Richins, Jr.)

Q. If you dropped the charges?

A. Yes, sir.

Q. Now, after you were discharged, Mr. Richins, did you seek further employment somewhere else?

A. Yes, sir. [80]

Q. Did you find a job?

A. Well, you might call it that.

* * * * *

Cross Examination.

Q. (By Mr. Langmade): And isn't it true that this is the first time that you have driven this type of heavy diesel equipment?

A. You might say it was the first diesel experience I had but not the first heavy-duty equipment experience I had.

Q. But that is the first diesel truck experience you had; is that correct?

A. That is correct, sir. [81]

* * * * *

Q. (By Mr. Langmade): Isn't it true that it was closer to five days from the time you had transmission trouble until the time you were discharged?

A. No, sir, because you can't make an El Paso-Phoenix turnaround in less than 24 hours, and I pulled three or four more trips after transmission failure, and the truck was in the shop at least three days or more getting repaired after the roadside repair job we did on it in Lordsburg.

Q. But at the time there was the truck failure, there was no knowledge on your part or Mr. Quisen-

(Testimony of E. W. Richins, Jr.)

berry's part as to what actually happened, but you knew there was something wrong with the transmission? A. How was that again? [83]

Q. I will withdraw that question.

* * * * *

Q. And you did know that the trucks are repaired in Phoenix; is that correct?

A. In cases it can be roadside repair; they are repaired on the spot.

Q. But this was more or less of a major repair?

A. It was patched up in Lordsburg and drove, probably, I believe it was tied up in Phoenix when it got here and unloaded.

Q. Now, are you familiar with how a transmission can be ruined? A. Yes, sir.

Q. How is that?

A. I do know that you never run a big gear and a little gear together or a power gear and a speed gear together; that with the proper handling and care, if the equipment wasn't faulty, that it wouldn't tear up.

Q. And doesn't it also depend on the ratio at which you shift gears from one gear to the other? In other words, your truck has to get a certain amount of revolutions per minute before you shift from one gear into the other?

A. That is right, if it is not ready to go, if it is not ready to shift, there is no way of putting it in there without [84] completely tearing it up. It would be just deliberately destroying it just like a little boy with a hatchet.

(Testimony of E. W. Richins, Jr.)

Q. Well, that is what is referred to as jamming them in place, is that right? You have to use pressure.

A. You have to use more than pressure. [85]
* * * * *

Redirect Examination

Q. (By Mr. Schoolfield): Mr. Richins, you have testified that after you had the transmission trouble you made more runs. Did you make the runs in the same truck in which you had transmission trouble? A. Yes, sir.

Q. Now, you drove that truck on three or four more runs after the transmission failure; is that right?

A. At least three more, I had another truck the last trip.

Q. I see. Now, when you drove the truck before your transmission trouble, did you know of a faulty transmission at that time in that truck?

A. Oh, you couldn't exactly trace it to a faulty transmission. We will say it was in a bad state of repair all over. I had nursed it up and down the highway from the time I got it to the time I got off it, for first one thing and then another.

Q. Did you ever advise any member of the management of that?

A. Someone was notified at the end of each trip about the mechanical failures of it.

Mr. Schoolfield: That is all I have.

(Testimony of E. W. Richins, Jr.)

Recross Examination

Q. (By Mr. Langmade): Now, isn't this true, Mr. Richins, that [87] you had faulty transmission trouble and then that transmission was removed and a new transmission was put in the truck; is that not correct? A. In my truck?

Q. Yes.

A. No, sir, I didn't follow it to Phoenix, so I couldn't say whether they even touched it or not, but I do know that it was roadside patched up in Lordsburg. The parts were robbed from another transmission similar to the one I had torn down and patched up enough to get to Phoenix. It may have just sat here three days.

Q. When it got to Phoenix, do you know whether there was a new transmission put in it?

A. No.

Q. When you got it back, when you got it back with the new transmission, you again had trouble?

A. No, I only had one set of trouble as far as transmission failure is concerned.

Q. Well, over how long a period of time did you have transmission trouble? When was the first time you had transmission trouble?

A. Just the first time when I broke down there and was tied into Lordsburg and it just happened in a matter of—there was no warning noises, it just let me down right in the middle of the road.

Q. Then you state the transmission was merely repaired, that there wasn't a new transmission?

A. No, sir.

(Testimony of E. W. Richins, Jr.)

Q. This wasn't a new transmission placed in the equipment?

A. No, Mr. Almada went down to help the company mechanic pull the transmission out and rob another transmission of the necessary parts to patch this one up to get the load of gas to Phoenix.

Q. When you put in the new gears, you said that you had automotive experience. Doesn't that practically make it the same as a new transmission?

A. If you replace every piece in that old case, replace the bearings, then you would have something similar to a new transmission, but when you go in an old transmission and rob a good gear out of it and put it in another old transmission, you have a long ways from a new transmission.

Q. But there was an entirely different set of gears placed in there?

A. No, sir, there wasn't an entirely new set of gears placed in there. As near as I can remember, we used the fifth gear out of the other transmission and maybe the counter shaft. There were notches as big as a nickel or maybe a little bigger than that out of some of the teeth of the transmission that we put together to get that truck into Phoenix.

Q. Well, normally, you having said that you had automotive [89] experience, when a transmission is fixed like that, shouldn't it run for a considerable time before it goes out again?

A. It depends on how it was fixed. In this roadside job, it wasn't fixed, it was patched up long

(Testimony of E. W. Richins, Jr.)

enough to get it to some place it could be fixed. [90]

* * * * *

Examination

Q. (By Trial Examiner Doyle): Now, then, how did it come about that the other three drivers took out a truck and you didn't take out one?

A. I can't explain it. I don't know whether Mr. Quisenberry was going to let me know then or at some later date whether I had been fired or not. But this other party, they asked me what I was going to take and it caught me kind of off balanced and I said it doesn't look like that I am going to take. And then Mr. Quisenberry explained to me that they had put the pressure on him in Phoenix.

Q. Quisenberry wasn't there? A. Yes.

Q. He was there, too? A. Yes.

Q. What did he say to you and you to him about going out?

A. Well, I looked to him and I said "They put the pressure on in Phoenix and I had to let you go." If they hadn't put it on up there, I don't know when he would have notified me. If I hadn't been at the truck stop, maybe I would have still been wondering.

Trial Examiner Doyle: That clears up my mind on that point.

Mr. Schoolfield: I am finished with the witness.

Trial Examiner Doyle: Is there anything further?

Mr. Langmade: No. [91]

(Testimony of E. W. Richins, Jr.)

Trial Examiner Doyle: All right.

Just a minute, maybe counsel can refresh my recollection. When did this man go to work?

Mr. Schoolfield: Mr. Richins went to work around the 25th of April, I believe, Mr. Examiner.

Trial Examiner Doyle: And this transmission incident is supposed to take place when?

Mr. Schoolfield: About 15 days before his discharge, which was the 25th of May, he said. It was around April 10th or 12th, somewhere in there—I mean May the 10th or 12th.

Is that as near as you can remember, Mr. Richins, about 10 days before you were discharged, I think you testified ten, did you not?

The Witness: About that.

Q. (By Trial Examiner Doyle): Well, now, as I get it, you went to work on April 28th and you were discharged on May 25th.

A. Yes, sir.

Q. And the transmission incident took place about 10 or 15 days before May 25th.

A. Yes, sir.

Q. That would be about May 10th or May 15th?

A. Yes, sir.

Q. So you were on the job from the 28th to about May 15th before the transmission trouble?

A. Yes, sir. [92]

Q. Did you have any trouble with the transmission up to that time?

A. Not with the transmission, no, sir.

(Testimony of E. W. Richins, Jr.)

Q. Did you also drive the same truck all the time? A. Yes, sir.

Q. When did you first notice the trouble with the transmission?

A. Just about the instant when it quit.

Q. Where were you running from at the time you noticed that?

A. Oh, I was approximately 15 miles west of Deming or 45 miles east of Lordsburg.

Q. How did the trouble with the transmission disclose itself?

A. Well, when I first heard the noise, I didn't think it was transmission trouble at all, but that I had an engine failure, probably a connecting rod broken.

Q. What kind of noise was it.

A. Just a rattle, bang bang, and I immediately killed the engine and kicked it out of gear and got it off the road.

Q. That was the first of that kind of trouble you had?

A. Yes, sir, with that particular piece of equipment.

Trial Examiner Doyle: Are there any further questions?

Mr. Schoolfield: How long a truck were you driving, Mr. Richins?

The Witness: I believe it is a 1950 or '51 Sterling.

Mr. Schoolfield: Had there ever been a new

(Testimony of E. W. Richins, Jr.)

transmission in it of your own knowledge, do you know? [93]

The Witness: Mr. Doolittle or the company mechanic said that the only reason that transmission hadn't been replaced before now was it was a situation where the larger transmissions weren't available. He said that was too small a unit for the load it was pulling.

Mr. Schoolfield: Too small?

The Witness: It was too small a transmission for the gasoline trucks.

Q. (By Trial Examiner Doyle): You were there when the transmission was pulled out, were you?

A. Yes, sir, I made it a point to be there.

Q. What was wrong with it?

A. The fifth gear broke half in two and fell off the counter shaft down among the other gears thus locking it so nothing could move. Incidentally, I shut it off before I had a chance to break the cast iron housing or even spring the case.

Recross Examination

Q. (By Mr. Langmade): Mr. Richins, can I just ask you one more question on this?

A. Yes, sir.

Q. The transmission locked just like you said, then it was taken into Lordsburg and patched up and taken on into Phoenix; is that correct?

A. That is right.

(Testimony of E. W. Richins, Jr.)

Q. Then you don't know what happened to the transmission in [94] Phoenix?

A. No, sir, I don't know. I know that three or probably four days went by before the truck came back.

Q. Then the truck came back?

A. Yes, sir.

Q. And then you again went on that truck and you had transmission trouble again?

A. No, sir, I had transmission trouble once and once only.

Q. You never drove that truck after it left Lordsburg going to Phoenix?

A. Yes, sir, I made three or probably four runs on that truck but I had no more transmission troubles with it.

Q. No more transmission trouble?

A. I have no actual proof but I have heard later other men did have trouble with it before they got the big transmission to replace it with, but I had no more trouble with it.

Q. You mean up to the time you were discharged?

A. From the first breakdown until the time of my discharge, I had no more trouble.

Q. At the time of the discharge, there was nothing wrong with the transmission?

A. It would get down the road and get back.

Q. That is not what I am asking you.

A. I can't say there was anything wrong with it without tearing into it and making an inspection.

(Testimony of E. W. Richins, Jr.)

tion. From the outside appearance, [95] no, there wasn't.

Q. But you knew the first time that it was transmission trouble but you didn't know the second time that it was; is that correct?

A. I didn't say that.

Q. Well, then, what was wrong with it at the time you were discharged?

A. That was Slim's excuse for discharging me, was the transmission failure.

Q. The second time?

A. No, the first time. I only broke it once.

Trial Examiner Doyle: Counsel seems to be asking a question which to me seems to be quite simple and the question is this, Mr. Richins: The transmission broke down once?

The Witness: Yes.

Trial Examiner Doyle: And you made a patch-up repair and it went to Phoenix and I understand it there a more thorough repair job was supposed to have been done on it and then the truck came back to you and you made two or three more runs?

The Witness: Yes, sir.

Examination

Q. (By Trial Examiner Doyle): Now, after it was delivered to you after Phoenix and you made these two or three more runs, did you notice anything wrong with the transmission after that?

A. No, sir. [96]

(Testimony of E. W. Richins, Jr.)

Q. Now, during this time that you were driving for the company, did you change your status with the union in any way from withdrawal card to taking out your book or becoming a member in good standing?

A. I am still on the same withdrawal card. There was an application signed but it was never carried any further. There was no money involved, no money changed hands.

Q. Did you do anything in regard to the union during this period? A. No, sir.

Q. Were there any union meetings of the men during this period?

A. To Mr. Quisenberry's men?

Q. I mean of any of you drivers, were there any union meetings?

A. I didn't discuss the union activities with the drivers.

Q. You didn't discuss it with anybody, then, I take it?

A. I seen Mr. Stratten once in Lordsburg but that was just between me and Mr. Stratten.

Q. Who is he?

A. He was the Local 104 representative in Phoenix.

Redirect Examination

Q. (By Mr. Schoolfield): Mr. Richins, did you sign a union application blank during your employment with Texas Independent? A. Yes.

Q. And there was union activity during that time, was there not? [97] A. Yes.

(Testimony of E. W. Richins, Jr.)

Q. Boys were signing blanks?

A. Yes, sir.

* * * * *

JOHN COX

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Doyle: Give your full name and address to the reporter, please.

The Witness: John Cox, 850 East Navajo, Tucson, Arizona.

Q. (By Mr. Schoolfield): Now, Mr. Cox, you are going to have to talk slowly and loud and just take your time, nobody is going to rush you.

Where were you employed prior to May 15, 1953, Mr. Cox. A. Texas and Independent Oil.

Q. When were you employed by this company?

A. April 25th.

Q. 1953? A. Uh-huh.

Q. What were your duties? [98]

A. Driver.

Q. A truck driver? A. Yes.

Q. Did you drive the same type of trucks as the other witnesses who have testified?

A. Yes, sir.

Mr. Langmade: May we go off the record for just a second?

Trial Examiner Doyle: Yes. Off the record.

(Discussion off the record.)

(Testimony of John Cox.)

Trial Examiner Doyle: On the record.

Q. (By Mr. Schoolfield): When did you first talk with a representative of the company, Mr. Cox, would you tell us that?

A. On April 21——

Q. Speak up real loud.

A. April 21, I went to Quisenberry's house——

Q. Much louder than that, I don't think the Examiner can hear you. Sound off.

Trial Examiner Doyle: You are a big fellow but you have the softest voice and you are the softest-spoken gentleman I have ever heard. Sometimes I have a case where we have these little girls and they speak up so everybody can hear them. Let us keep the voice up. I have to hear you; the reporter has to hear you.

A. Well, on April 21, I went to Quisenberry's house.

Q. That is good. All right. [99]

A. Can you hear that?

Trial Examiner Doyle: Yes, that is fine.

A. So Al Jenson went with me and introduced me to Quisenberry, and so we talked about jobs and the runs and the pay and first one thing and then another, and then Quisenberry asked me if I was union and I told him no. So Al Jenson said no, that we both went delinquent in 1947. So Quisenberry asked me what I had been doing, what I had been driving at and I told him I had been working for my brother-in-law and so that about ended the conversation.

(Testimony of John Cox.)

Q. Did he ask you about how long you had been driving a truck? A. No.

Q. Did you take a student run when you went to work for the company? A. No.

Q. You just jumped on a truck and started driving? A. That is right.

Q. Did you ever have a further conversation with Mr. Quisenberry concerning your union book and when did this take place, if you had one?

A. Well, it was on or about May 1st. I went up to Quisenberry's house to get my load papers and we were talking and Quisenberry said, "Are you still keeping your book paid up?" And I said, "Yes." And so everything was silent for a little while and he [100] "How would you vote if it came up?" I said, "Oh, I don't know, I am undecided." So nothing else was discussed about that matter at that time.

Q. When did you next have a conversation with Mr. Quisenberry concerning the union?

A. Oh, it was about the 11th or 12th of May.

Q. And where did that conversation take place?

A. It was out at the 84 Truck Stop. We were just sitting there drinking coffee and talking and he asked me, "Johnny, how would you vote if it came up, if there was an election come up to see if the drivers wanted a union?" And I said, "Oh, I don't know, I am still undecided."

Q. Now, that was the second time?

A. Yes.

Q. May the 1st and then on May 11th or 12th?

(Testimony of John Cox.)

A. Yes.

Q. Now, did you have a discussion with Mr. Quisenberry about the union on May 15th. Mr. Cox?

A. Yes, I did.

Q. Will you tell the Examiner what took place then?

A. Well, on May 15th I came in from Phoenix from my run and I called Quisenberry up to report in to see when I went on again and first one thing and then another.

Trial Examiner Doyle: I can't hear you.

A. So he said, "Well, come on out to the house, Johnny, I want [101] to talk to you." So I said, "O.K.," so I went out to his house and said, "I just received a letter from Tucson and El Paso unions today and I *through* it in the waste basket." and he said, "I am definitely not going union."

Q. Go ahead. Now, what else did he say to you at that time?

A. That was about it.

Q. That was the day you were fired, was it not?

A. Yes.

Q. What did he say to you about discharging you, Mr. Cox?

A. He asked me how I was going to vote if it came up and I said, "Well, I don't know. I am undecided." He said, "Being you are undecided and still keeping your book up, maybe you had better get out and get a union job." So I said, "Well, O. K." He said, "You had better get out and get a union job because I am definitely not going union." So I said, "Well, O. K." He said, "Well,

(Testimony of John Cox.)

you figure up your trip sheets and I will call in Phoenix——”

Q. Now, speak up.

A. He said, “Well, you figure up your trip sheets and I will call Phoenix and you’ll have your check down there Monday.”

Q. Now, did he tell you any reasons at that time he was going to give for your discharge?

A. He said, “I know I can’t come out and fire a man for joining the union, but I will find a reason and make it stick.” And I said, “Well, what kind of reason are you going to use on me?” [102] And he said, “I am going to use that chart that shows you were running 58 miles an hour.”

Q. A chart which showed you ran 58 miles an hour? A. Yes.

Q. Now, will you explain to the Examiner the instance of that chart as near as you can remember it? Were you told to run 58 miles an hour? How did it happen?

A. Yes, on the second trip, on that particular truck, No. 7, I told Quisenberry out at the 84 Truck Stop, I said, “Quesy, running 55 miles an hour in that truck, it is not running but about 1,700 r.p.m.’s, why don’t you let me run it at 1,900 r.p.m.’s?” I said, “Why don’t you let me run it on up to 1,900 or 1,950, and I won’t be making but 58 miles an hour?” And he said, “Go ahead, keep the motor revved up where it should be.” So that is what I did. And I told the relief man on the other end to run it 1,950.

(Testimony of John Cox.)

Q. Now, Mr. Cox, would you explain to the Examiner the reason why it is advisable to run a truck motor around 1,950 to 2,000 r.p.m.'s?

A. Well, that is the cruising speed on one; it is where it should be run to keep the motor running free.

Q. Speak loud so the reporter can get it. What is the reason you want to run it up there?

A. You don't want to lug the motor. You want the motor running free. [103]

Q. Now, this particular No. 7 truck, what speed would it run in the gear at 1,950 r.p.m.'s, in the fourth gear, let us say?

A. Well, it would probably run around about 50 miles an hour.

Q. And in fifth gear what would it run?

A. Well, at 1,950 it would run 58 miles an hour.

Q. And any r.p.m. below 1,950 to 2,000 is lugging; is that correct?

A. No, anything below 1,900.

Q. How about above 2,000, what happens then?

A. Well, above 2,100 is overtaxing it.

Q. I see.

A. And you are endangering it.

Q. And Mr. Quisenberry told you to run that truck free to keep from lugging it up, that the r.p.m.'s were the important thing.

A. Yes.

Q. And you drivers, do, do you not, gage your speed by gears and keep your engine revved at a certain r.p.m. at all times?

A. Yes.

Q. For instance, if you want to drop it down to

(Testimony of John Cox.)

30 miles an hour, you might want to use third gear or second gear? A. Yes.

Q. But your engine is going 1,950?

A. Yes, between 1,900 and 2,100.

Q. Now, you testified that Mr. Quisenberry, when he discharged you, told you that the reason that he was going to give was 58 [104] miles an hour? A. Yes.

Q. And he had the tach chart or card?

A. Yes.

Q. And this is the instance under which you remembered turning in a 58-mile-an-hour tach card; is that correct? A. Yes. [105]

* * * * *

Cross Examination

Q. (By Mr. Langmade): Here is one thing I am confused on, Mr. Cox, and that is you testified in the beginning that you were delinquent and had a withdrawal card since 1947?

A. I didn't say nothing about a withdrawal card.

Q. You merely paid no dues since 1947?

A. That is right. I said we went delinquent in 1947.

Q. And were you a member in good standing when you were delinquent? A. What?

Q. And were you a member in good standing when you were delinquent?

A. I never have been delinquent. That is what I told Quisenberry. [107] At the time I told him

(Testimony of John Cox.)

that, I was in good standing and my book was paid up. In other words, I lied to Quisenberry.

Trial Examiner Doyle: As I understand your testimony, when you first went to work, he asked you if you were a member of the union and you said you weren't; is that it?

The Witness: That is right.

Q. (By Mr. Langmade): But that was a lie?

A. Yes, that was a lie. In order to get the job, I had to tell him that.

Q. And at that time and at all times prior to that time and up to and including the present time, you have been and you are now a fully-paid union member?

A. Oh, yes. [108] * * * * *

Q. Now, hadn't you been warned by Mr. Quisenberry once before the time you were discharged that you had been exceeding the speed limit?

A. Never.

Q. Did you know what the company's speed limit was?

A. Yes.

Q. What did he say it was? [109]

A. Fifty-five.

Q. And wasn't it after he had warned you about speeding that you told him that that truck ran better at 58 miles an hour than it did at 55?

A. Well, to start with, he never did warn me.

Q. Well, was Mr. Almada your partner on the other end?

A. He was on No. 15 but he wasn't on No. 7.

Q. And do you know whether or not he followed

(Testimony of John Cox.)

your instructions and exceeded the speed limit on his end of the run?

A. Well, he wasn't driving No. 7 and I don't know.

Q. But you told him to go more than that?

A. No, not Harry Almada, no.

Q. Who did you tell?

A. Gene Bowers or Glenn Bowers whatever his name was.

Q. And whether or not Glenn Bowers went more than 55 miles an hour, you don't know?

A. I don't have any idea.

Q. If these charts which show that he didn't, they would be accurate, would they not?

A. Well, I don't know whether they would or not.

Q. Well, have you been driving for quite some time?

A. Yes. I have been driving all my life.

Q. As a general rule—

A. I don't know whether he went over 58 miles an hour or not, I don't know. I never took the chart out to look. I know I drove [110] between 55 and 58 miles an hour. Whether he did or not, I don't know. I didn't go with him on the trip.

Q. And then at the time you were discharged, didn't Mr. Quisenberry say to you that it is a company rule that you cannot exceed 55 miles an hour when your tachograph shows that for long periods of extended driving you have been going 60? Where

(Testimony of John Cox.)

had you been employed before the time you went to work for Texas Independent Oil Company?

A. Well, how long before?

Q. Well, within the last six months?

A. I was employed four years for Bonds Trucking Company out of Phoenix.

Q. James Bond? A. Uh-huh.

Q. He is a dump truck operator?

A. Yes. Before that I worked for Hopper Transportation.

Q. Well, you had been working for the last four years prior to the time you took this job for James Bond? A. Uh-huh.

Q. The four years you were employed by Mr. Bond, you didn't operate any type of equipment that was similar to this equipment of Texas Independent Oil Company?

A. Well, they was diesels but they wasn't this type.

Q. They were all small dump trucks, were they not?

A. No, they were water trucks, 5,500 gallon tankers. [111]

Q. Now, you say that Mr. Quisenberry said to you one day, "Are you still keeping your book paid up"? A. Uh-huh.

Q. When did he finally find out you were a fully paid member?

A. I don't think he knew; I think he was just guessing in the dark.

Trial Examiner Doyle: On that occasion, as I

(Testimony of John Cox.)

understand it, you said you were keeping up your book?

The Witness: Uh-huh, yes, sir.

Q. (By Mr. Langmade): How long actually had you been employed by the Texas Independent before your discharge?

A. Oh, about 25 days.

Q. Pardon?

A. Twenty five days; April 25 to May 15.

Q. Well, you first said you went to work on April 21st?

A. I didn't say I went to work on April 21st. I said I went to see about a job on April 21st.

Q. All right, when was it you actually were employed?

A. April 25th was when I actually went to work.

Mr. Langmade: I believe that is all.

Redirect Examination

Q. (By Mr. Schoolfield): Mr. Cox, you stated you worked for Hopper before you went to work for Texas Independent?

A. No, I worked for James Bond before that.

Q. Now, what type of company did Hopper have? [112]

A. They have livestock rigs.

Q. About how much experience did you have on diesel trucks before you went to work for Texas Independent?

A. For four or five years.

Q. That you had driven them that much?

A. Uh-huh.

(Testimony of John Cox.)

Q. And you also stated before that you weren't even given a test run; is that correct?

A. That is correct.

* * * * *

KENNETH L. VAN HORN

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Doyle: Give us your name and address, please.

The Witness: My name is Kenneth L. Van Horn. My present address is 66 Truck Stop, Tucson.

Q. (By Mr. Schoolfield): Now, Mr. Van Horn, when did you go to work for the respondent company?

A. Well, on or about approximately May 1st.

Q. On or approximately May 1st, 1953?

A. Yes, sir.

Q. When were you discharged?

A. On May 12th, the same month.

Q. May the 12th of the same month?

A. Yes.

Q. You worked approximately 12 days?

A. Approximately that.

Q. Will you tell the Examiner what happened? What conversations you had with Mr. Quisenberry on May 12 when you were discharged?

A. Well, on May 12 I had just made a run to

(Testimony of Kenneth L. Van Horn.)

Phoenix—do you want the conversation after I came back?

Q. I want to know where you were when you talked to Mr. Quisenberry.

A. I was at the 84 Truck Stop.

Q. And what were you doing when you first saw Mr. Quisenberry that day?

A. Well, we all met at the 84 Truck Stop in the Cafe.

Q. Were you sitting with Mr. Quisenberry and some others at that time?

A. I was sitting with Slim and myself on one side of the booth and Stew Seymour on the other.

Q. Speak up Mr. Van Horn.

A. Stew Seymour and I, and I don't know who the other party was. It was either Mr. Nutter or Mr. Saner.

Q. How come you got in a conversation with Mr. Quisenberry at that time?

A. Well, we was all just more or less talking truck talk there for awhile until one of the trucks came in.

Q. I see.

A. One of the trucks came in and everybody got up to leave to go outside and I started to go outside and Slim said, "Wait a minute, I want to talk to you."

Q. He said, "Wait a minute, I want to talk to you"? A. Yes.

Q. What did you do?

A. Well, I sat back down and he said, "Well,

(Testimony of Kenneth L. Van Horn.)

Van, I got your check for you." I said, "What do you mean, my check"? He says, "Who did you talk to today in Phoenix"? I said, "What do you mean, what do you mean who I talked to"? He says, "You talked too much. That old boy you was just talking to up at Blakely No. 1 is old man Steele's right-hand man." He says, "As soon as you left there, he went right directly to the old man, to old man Steele, and told him you were instigating the union." I said, "Hell, I didn't say nothing to that old man."

Q. All right.

A. He said I was around there talking about——

Q. Now, this was the fellow you saw at Blakely's where you were loading gas?

A. Unloading.

Q. Before you saw Mr. Quisenberry?

Mr. Langmade: Will you name the individual?

The Witness: That I was talking to?

Mr. Langmade: Yes.

The Witness: No, I don't know who it was. Slim mentioned his name at the time but I never heard of it.

Q. (By Mr. Schoolfield): What did Mr. Quisenberry say to you at the 84 Truck Stop. Keep on with that conversation.

A. Well, he said this man went right directly to the old man, to old man Steele and told him what I had said.

Q. Go on.

A. He says, "When I went in the office today,

(Testimony of Kenneth L. Van Horn.)

the old man jumped down my throat." He said he asked him, "Who is this guy that was unloading down at Blakely No. 1 today?" And Slim told him. He said, "Well, you'll have to get rid of him. He is instigating the union."

Q. And what did you say?

A. I told him, I says, "Hell, Slim. I wasn't talking to the old man. All he did was ask me about different fellows that work down there and he asked me about particular ones and he said, 'How are you coming on the union deal?' I says, 'So far there hasn't been too much said about it. There was talk about [116] passing out blanks, getting to go union.' and he says, 'You are about to get it organized.' Actually, I didn't know who it was. I thought he was the worker around the station and he was getting in my way and I was trying to get unloaded." And he says, "Do you think you'll get organized?" And I said, "Yes, maybe one of these days we will," and I just went on about my business.

Q. That is the conversation you told Mr. Quisenberry in the 84 Truck Stop?

A. He was repeating the conversation he had with Horace Steele and I was repeating the conversation I had with the fellow at the station.

Q. I see. Now, what else did Mr. Quisenberry say about your discharge?

A. Well, at the time I told him, when he first told me about it, I got to thinking about it and I said, "Slim, I think it is a 'chicken blank deal',"

(Testimony of Kenneth L. Van Horn.)

and I said, "I didn't say nothing to the old man out of the way. I don't know who he was. I never tried to instigate the union. All I have done, they passed out blanks and I signed one of the blanks because I was a union member," and Slim knew that when I went to work.

Q. When you went to work, did Mr. Quisenberry ask you if you were a union member?

A. Yes, he did.

Q. And what did you tell him? [117]

A. I told him I was out on withdrawal from 692 in Long Beach, California.

Q. In Long Beach, California?

A. Yes, sir.

Q. And you testified that Mr. Quisenberry said, "Well, the old man said get rid of him for instigating the union"? A. Yes.

Q. And he gave you your check?

A. Yes, he already had it made up.

Q. That was May 12, 1953?

A. I am not positive about the date, but it had to be either a day before or a day after, because I haven't got the check stubs to say sure it was the truth.

Trial Examiner Doyle: That is to the best of your recollection?

The Witness: Yes.

Q. (By Mr. Schoolfield): Did you talk any more to Mr. Quisenberry at that time?

A. Yes, well, I told him—he made me kind of sore when I got discharged like that and I told

(Testimony of Kenneth L. Van Horn.)

him it seemed like to me if I was in charge of a group of men. I would have the say-so on who I hired and who I should fire, and I told him I thought it was a pretty chicken deal and he should do something about it because he was satisfied with my driving. He had never complained in any way about it. [118]

Q. Did you talk with Mr. Quisenberry any more that night?

A. Yes, after he and I left he took me home down to the motel where I was staying. And we talked there and I told him again about the chicken deal and he said, "Yes, I guess it is. I admit that it is," he says, "but my hands are tied, there is nothing that I can do about it." But he says later if he had to go union, that I could come back to work.

Q. Now, Mr. Van Horn, how long were you off work after that?

A. Well, actually, I haven't worked but about six weeks since then.

Q. Now, where are you working right now?

A. Texas Independent.

Q. You are back working with the company again? A. Yes.

Q. When did you start back with the company?

A. Well, I talked to Mr. Quisenberry a week ago Friday, I believe it was.

Q. All right. What did he say to you then?

A. I asked him about a job and he asked me how bad I needed a job and I said, "Pretty bad."

(Testimony of Kenneth L. Van Horn.)

He said, "Well, I need some men in El Paso." At that time he never said anything about needing men in Tucson.

Q. He said he needed men in El Paso?

A. Yes.

Q. Were you in El Paso at the time you talked to Mr. Quisenberry? [119]

A. No, sir, I had called him from Chandler.

Q. From Chandler, Arizona?

A. Yes, sir.

Q. Now, what did you do then? Did you go to El Paso?

A. No, he told me that he would stop by on his *out* and see me. Well, I thought maybe I might miss him so I got in the car and drove to Phoenix and saw him at the plant.

Q. And you were then rehired by the company?

A. I was rehired. I made out my withholding statement but he changed, he said, "I want you down in Tucson." and I asked him, I said, "I will go to Tucson but later I would like a chance to transfer to El Paso."

Q. You were in El Paso then?

A. I came down to Tucson and pulled one trip to Phoenix and came back, and Jenson was talking to him on the phone in El Paso. I told Al to ask him if I could come down and work on the same truck on that end and he said, "Yes, tell him to be down here ready to go tomorrow night."

Q. Did you have any union conversation with Mr. Quisenberry around the time you were rehired?

(Testimony of Kenneth L. Van Horn.)

A. Well, just that he said, "Well, now, about this union deal, I am not going to tell any man how to vote." He says, "But I still want it non-union." I says, "O. K., Slim, that is the way it will be then." That is what I said. And he said, "Now, understand, I am not going to fire anybody regardless of how he [120] votes."

Q. He told you he wasn't going to fire anybody and this was just last week?

A. Just last week.

Q. Now, would you tell the Examiner more definitely exactly when you started back working for the company?

A. I started last Monday morning.

Q. This past Monday morning? A. Yes.

Q. Let's see, this is the sixth—

Trial Examiner Doyle: You don't mean yesterday. Was it a week ago yesterday?

The Witness: A week ago yesterday.

Q. (By Mr. Schoolfield): That would be around September 28.

Now, did you have a conversation around last Wednesday night with Mr. Quisenberry about the union?

A. Oh, last Wednesday night, I am not sure it was Wednesday. I think it was Wednesday. We were in El Paso at the refinery and it so happened that I was supposed to go out that night and later that night I got down there and he had already promised another man to go out on it. So he told me that that man's truck was broken down and he

(Testimony of Kenneth L. Van Horn.)

was entitled to go out that night, that I would be able to make the next trip. And during that conversation I asked him about—or he said to me about the union, “Now, about this union, I don’t want it union.” He says, “I am not going to [121] tell any man how to vote but I don’t want the union.”

Q. Did he mention anybody’s name, any of the drivers’ names at that time?

A. Yes, I think it was brought up. He said, “No.” He told me then, he says, “I have to appear in court.”

Q. All right.

A. And I says, “Oh, yes, I remember my wife saying that Al got his subpoena.”

Q. Al who? A. Al Jenson.

Q. And then what did Mr. Quisenberry say?

A. He said they had him for some unfair labor act, or something.

Q. Did he say anything about the group back on the Tucson end?

A. Yes, he said, “I have no doubt about what everybody on that end will go union.” He said, “They have a pretty bunch of boys down here and I think they will stick with me,” meaning El Paso.

Q. Did you ask Mr. Quisenberry about your seniority when you had just gone back to work?

A. Yes, I said, “Slim, it is like this, you know I got a pretty chicken deal up there at Tucson.” He said, “Yes, I will admit it.” And I said, “All right, if I come back and go non-union, will I get

(Testimony of Kenneth L. Van Horn.)
my seniority standing?" And he said, "Yes, you are damn right, you will."

Q. Is that all he said at that time? [122]

A. I believe that is all the conversation then.

Mr. Schoolfield: Pass the witness.

Mr. Langmade: Mr. Examiner, may I have a few minutes?

Trial Examiner Doyle: All right. Let us have a five minute recess.

This is one of the men whose name was added to the complaint, was it not?

Mr. Langmade: Yes, sir.

* * * * *

Cross Examination

Q. (By Mr. Langmade): Mr. Van Horn, who had you been employed by prior to the time you went to work for the Texas Independent Oil Company on May 1st?

A. Refiner's Co-operative, Incorporated, Bell, California.

Q. Was there anything said about your union membership or non-membership at the time you were employed?

A. Nothing other than he asked me if I was union and I told him I was out on withdrawal.

Q. How about the present time, are you on withdrawal now?

A. I am on the same standing, a withdrawal from another Local, though.

Q. Now, is this true, that on the 10th day of May you were to [123] take a run out at 7:00 a.m.

(Testimony of Kenneth L. Van Horn.)

in the morning and you weren't there and Mr. Quisenberry happened to be at the place you were to pick up the truck and went over to get you, is that correct?

A. That, I can't remember, because I was living just two blocks from the truck stop.

Q. Do you remember him coming over and waking you up? A. Yes, I do.

Q. And did you know you were to get out at 7:00 a.m. that morning?

A. He told me he would go out and have the man stop by and wake me up when he came in.

Q. And then on the 12th you were to take a truck out at 3:00 a.m. in the morning; is that correct? A. May 12th?

Q. May the 12th, the day you were discharged?

A. I don't remember exactly what time I was to take it out, but I was there to take it out. I spent more time there than I did at home.

Q. Isn't it true that on the morning of the 12th you arrived to pick up the truck around 5:00 a.m.?

A. I don't know. Somebody came down and woke me up that morning. In other words, that was the understanding. I had spent so much time waiting around for trucks that he said it was no need of it. He said, "You may as well go to bed and when the driver comes in, I will come down and get you." [124]

Q. Didn't you tell Mr. Quisenberry when you got over there that you were sorry that you had slept in? A. No, sir, I didn't.

(Testimony of Kenneth L. Van Horn.)

Q. Isn't it true that the truck was gone when you got there, the truck you were supposed to take?

A. No, sir, at that time they were so messed up on the drivers, nobody knew who was going to drive what. Part of the time when you got down there another driver would be on your truck and you would never know who was going to drive what.

Q. Didn't you know on the morning of the 12th that you were to be there at 3:00 a.m.?

A. No, sir, I don't remember exactly what time it was supposed to leave, even. I was never supposed to be up to the truck stop. I spent most of my time there but the understanding was that when the trucks came in, instead of me standing around there not getting any sleep——

Q. Didn't you know you were supposed to take a truck out that morning?

A. If one came in and somebody came in and woke me up, I know I was supposed to take it, whatever it was.

Q. Now, you say somebody came in at 5:00 a.m.?

A. I don't know; I don't know what time.

Q. Do you know approximately what time it was?

A. No, I couldn't say for sure, because I couldn't even say what time it was I got to Blakely No. 1 in Phoenix. [125]

Q. Well, then, is it true that you didn't take a truck out until 2:00 p.m. that afternoon?

A. I wouldn't say so. I think, I am not sure, I think it was sometime in the morning.

(Testimony of Kenneth L. Van Horn.)

Q. Well, you have been quite positive on the rest of your statements, can you sort of refresh your memory as to whether or not, if you got there—was it early in the morning that you got there?

A. Where, in Phoenix or at the truck stop?

Q. Where you were supposed to take the truck from.

A. Well, I was there as soon as they came down and woke me up. That was long enough to get up and put my clothes on and go down and pick it up.

Q. When you got there did you take off?

A. I remember I made a trip to Phoenix that day, so I must have.

Q. Well, it was not until 2:00 p.m. until another truck came in? A. No.

Q. Do you remember approximately what time you did get there in the morning?

A. Well, I got in that night and it was just getting dark and it is about, on an average, a two and a half to three hour run.

Q. That is on the night of the 11th?

A. The 12th; it was the 12th I am talking about.

Q. Is this true, that you took a truck out at 2:00 p.m. from Tucson to Phoenix and in that distance you made your turnaround and came back to your home base at Tucson?

A. Will you repeat that question.

Trial Examiner Doyle: I am a little bit confused here, too, now. Are we talking about the morning of the 12th when this man was allegedly discharged?

(Testimony of Kenneth L. Van Horn.)

Mr. Langmade: Yes, it all happened during the same day.

Trial Examiner Doyle: I wasn't quite clear about that.

Q. (By Mr. Langmade): What time did you arrive back in Tucson that night?

A. All I know is just around dark, dusk, dark when we got back.

Q. And that was in May, is that right?

A. May 12, I think, I am not positive.

Q. And the sun goes down around 8:00 p.m.?

A. Well, I would say I got back approximately around 6:00 would be more like it.

Q. Well, you said it was dusk. Is it dusk at 6:00 o'clock?

A. We went inside the cafe and I imagine we sat in there for an hour or so. At least when we came out, it was dark.

Q. All I want you to do is just tell me the truth.

A. That is what I am telling you.

Q. You do remember it was dusk?

A. No, I said I think it was dusk.

Q. All right, then, placing the time at 6:00 p.m., it couldn't [127] have been any earlier than that, could it?

A. It could, possibly.

Q. And how long does it take you to go from Tucson to Phoenix and back again? How many hours?

A. Well, you mean into Phoenix proper?

Q. No, from the time you left Tucson to go to Phoenix and come back, how many hours?

(Testimony of Kenneth L. Van Horn.)

A. You mean to Phoenix proper or to some of our drops?

Q. You testified, I believe, that you went to Blakely No. 1. A. Yes.

Q. Where is that located?

A. That is at 19th and Buckeye Road.

Q. How many hours did it take to make that trip?

A. I would say on an average it should take eight hours.

Q. That means you would have left at 10:00 o'clock in the morning to go to Phoenix and get back at 6:00 p.m. that night?

A. It would take eight hours to make the loop.

Q. Now, you say that you are back employed by Texas Independent Oil Company?

A. Yes, sir.

Q. And I was a little bit confused about the fact that you came to Tucson and then went to El Paso and then had gone back to Tucson. Now, was that Mr. Quisenberry's fault?

A. Fault, speaking of what?

Q. Of the fact that there was a mix-up and another truck came [128] on?

A. No, it was no fault of his whatsoever. I don't guess, anyway. I mean I took it that his intentions were right, what he told me.

Q. At any rate, you were satisfied with your re-employment? A. Yes.

Q. And he did pay you for the trip of coming

(Testimony of Kenneth L. Van Horn.)

from Tucson to El Paso and back because there was a mix-up?

A. He said he would do so, yes.

Q. Let me ask you this, have you changed your story any from the time you were discharged up until the time you were re-employed as to any matters in connection with the union?

A. No, it was quite understood that when I went to work, I quite understood why I got fired, and quite understood when he hired me back.

Q. And so far as you know, you made no definite statements to him when you were rehired that were different from the first time you were employed?

A. I did tell him, "At least the next time I will keep my mouth shut." [129]

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LLOYD HINDS

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows: [131]

Direct Examination

Trial Examiner Doyle: Will you please give us your name and address please?

The Witness: Lloyd Hinds, El Paso, Texas, Barker Road 7262.

Q. (By Mr. Schoolfield): Mr. Hinds, what is your occupation; what do you do for a living?

A. I'm a truck driver.

Q. When did you first meet Mr. Quisenberry?

(Testimony of Lloyd Hinds.)

A. Oh, about March 20th or 22nd, somewhere along there.

Q. And where did you happen to meet him?

A. At the unemployment office.

Q. And what did he say to you in the unemployment office?

A. He said—he asked me if I was working and I told him that I wasn't. I said right at the present time the union doesn't have anything for me. I am down here to draw my unemployment compensation.

Q. What did he say to you then?

A. He said, "Well, I am starting up a tank line on this end and you are the first driver I have talked to." He said, "Now, this job is going to be non-union." He said, "But I am paying union scale or maybe more. If the union goes up their scale, I will go up with mine."

Q. What did you say to him then?

A. I said, "Well, that is a good deal as long as I get a good paying job out of it, because I am here for employment compensation." [132]

Q. Did you go to work for the Texas Independent Oil Company then? A. No, sir.

Q. Did you wait around for a job at that time and expect a job from Mr. Quisenberry at this time?

A. Mr. Quisenberry told me he had to go to El Paso and he said he would be back Friday or Saturday night. He said he was going to meet Mr. Steele down there and talk with him and he would

(Testimony of Lloyd Hinds.)

let me know about it when he came back to Tucson.

Q. What did you do then?

A. I gave him my phone number, but he didn't call me. He told me he lost it, afterwards. He never called me I didn't have nothing to do so I was out at the house one day and they called me up from the Union Hall and said this Merrill Kembrey that hauls dynamite, he said he was calling from Benson and needed a driver.

Q. So you went to work for somebody else at that time? A. Yes, sir.

Q. Now, when did you next contact Mr. Quisenberry?

A. Well, I went to work down there the 7th of April for Kenbrey and I hauled about three loads of dynamite and I stopped out here at the 66 Truck Stop one day, filled up, and I asked him, "Do you ever see any of the Texas Independent Oil trucks through here?" And he said, "Yes, they are supposed to start servicing in here." That is what they told me out there. I said, [133] "Do you happen to have his telephone number or his address? I have been out trying to find his place and I knew it was out somewhere on East 10th Street but I had forgotten just where." So that fellow gave me his address and his phone number, so I called him up and he wasn't there. His wife was there. So she said that she would have him call me. So I said, "Well, I am in Benson and he can meet me or find me down there under the underpass there at Benson, Arizona, where our head-

(Testimony of Lloyd Hinds.)

quarters was with the dynamite trucks." So I kept working there and I got laid off. Well, I quit. And it was because there was not enough money in it for hauling dynamite. So I went to Lordsburg to look for work down there. And one day I was in there and Mr. Quisenberry came in there and I had another truck driver with me, Buckshot Keith.

Q. Buckshot Keith was with you?

A. Yes.

Q. All right.

A. And I asked him again, "Do you have an opening for me?"

Mr. Langmade: I see no relevancy of this up until the time he came in to actually get the job.

Trial Examiner Doyle: I expect we are going to get to the point where he is hired and goes to work here in a moment. Now, General Counsel, will you get to that as quickly as you can?

Q. (By Mr. Schoolfield): Now, where were you when you and Buckshot saw Mr. Quisenberry?

A. Lordsburg.

Q. What place, a tavern or where?

A. Well, I saw him in a tavern, yes.

Q. What did Mr. Quisenberry say then?

A. He said, "If you boys think you can hold down here for another week or ten days, I am pretty sure I will have a truck down here for you." He said, "I am supposed to get three or four new ones."

Q. Did he say anything about the union at that time?

(Testimony of Lloyd Hinds.)

A. Well, he said—while I was in there in the bar, two more boys came in, I don't know who they were.

Q. All right.

A. And they asked Mr. Quisenberry, they said, "Are you Mr. Quisenberry?" And he said that he was. He said, "I understand you are looking for drivers." He said, "I am, I am going to need several drivers in the next few days." But he said that it was a non-union job, and he said, "I am not going to hire any union drivers."

Q. All right.

A. So he said, "I am going to El Paso and I will be back in here in the next day or two."

Mr. Langmade: Was he talking to you or someone else?

The Witness: He was talking to some of the other boys in front of me and Buckshot Keith.

Mr. Langmade: I move that that be stricken.

Trial Examiner Doyle: Just a moment, as I got the inference of your testimony, all five of you were there together?

The Witness: Yes, sir.

Trial Examiner Doyle: Is that right, Mr. Quisenberry and you and Keith and these other two strangers?

The Witness: Yes, sir.

Trial Examiner Doyle: You were all talking there in a group?

The Witness: Yes, sir.

(Testimony of Lloyd Hinds.)

Trial Examiner Doyle: I will overrule the objection.

Q. (By Mr. Schoolfield): And that was all that Mr. Quisenberry said at that time?

A. He said, "I will see you boys in here about 8:00 o'clock."

Q. He said no more about the union?

A. That is right.

Q. Mr. Hinds, when did you finally go to work for Independent Oil?

A. The 6th of last month.

Q. The 6th of September? A. Yes, sir.

Q. How did you happen to go to work for them then? Will you tell the Examiner how that came about?

A. Well, I went to work for Whitfield and I worked down there until they laid me off. They had too many drivers and not enough business. So my last load for Whitfield was on Friday evening, [136] so I was going to dump it Saturday morning. Well, I was down there Friday afternoon when they got out down there, and Sam was there and I told him that was my last trip and Sam says, "Slim Quisenberry is needing some drivers." So I called him up that night and he said, "I have a job for you now; you called me just right."

Q. So he hired you, is that right?

A. Yes. He said, "I will have a job for you Monday evening." He said, "Would you be willing to move to El Paso," and I said, "I will."

Q. So you moved to El Paso? A. Yes.

(Testimony of Lloyd Hinds.)

Q. And when did you finally go to work for him? A. That was the 6th of last month.

Q. You finally went to work the 6th of last month? A. I pulled my first trip.

Q. Did you have a conversation with Mr. Quisenberry on or around September 19th in which the union was discussed?

A. Well, we was out at the refinery one afternoon. I was getting ready to take off. It was just before dark and we were sitting around the truck looking at a tag.

Q. Something was wrong with the truck?

A. It had been fixed but we were just checking it and talking about it.

Q. What did Mr. Quisenberry say to you? [137]

A. He said, "This company could really be a really good outfit if everybody is co-operative and it is run right." He said, "Of course, the Old Man don't want it union and he said that we are going to keep it non-union." He said, "I am going to see that it is kept non-union." And he said, "How do you feel about it?" I said, "Slim, I am either way. If it stays non-union and I need a job, I will work. If it goes union, I will join up again and work that way through the union."

Q. Did he say anything about it being non-union to keep your job?

A. He said, "Mr. Steele don't want this job union. He said if he had to, just because he bought these four new trucks, don't think he won't park them and get Whitfield to do the hauling or get it

(Testimony of Lloyd Hinds.)

hauled up by tank cars, because he is not going to go union. He don't want it to go union," I think that is what he said.

Q. Did he say anything else to you at that time? A. No, I don't believe he did. [138]

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Mr. Langmade: Mr. Examiner, may I ask a question on the voir dire to perhaps shorten this?

Trial Examiner Doyle: Yes, I think so, go ahead.

Mr. Langmade: Have you ever been discharged?

The Witness: Not that I know of. [141]

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SIDNEY W. BAILEY

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Doyle: Give us your name and address, please.

The Witness: Sidney William Bailey, 2218 West Hermosa Drive, [150] San Antonio, Texas.

Q. (By Mr. Schoolfield): Now, Mr. Bailey, will you tell the Examiner when you went to work for Texas Independent Oil Company?

A. Referring to my log book, I went to work on the fifth month, the 25th day of 1953.

Q. That is May 25, 1953?

A. At 8:00 p.m.

Q. Did you make out an application for employment? A. Yes, I did.

(Testimony of Sidney W. Bailey.)

Q. Who did you fill this out in front of, do you recall?

A. I filled it out in front of Mr. Nutter.

Q. Were you told when you applied for employment—

Mr. Langmade: I object.

Mr. Schoolfield: All right.

Q. (By Mr. Schoolfield): Mr. Bailey, I will hand you a document which I will first ask the reporter to mark as General Counsel's Exhibit No. 2, a paper application for employment, and hand General Counsel's Exhibit No. 2 for identification to the witness and ask him if that is the application form he filled out at the time. Is that your writing?

A. It definitely is.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 2, for identification.)

Q. Now, will you look down here at the bottom of the page and [151] notice where you put—what is this down here at the bottom where it says, "Activities Other Than Religious (Civic, Athletic, Fraternal, etc.)"?

A. Teamsters Local, et cetera.

Q. Will you tell the Examiner how come you put that in there at that time?

A. That paper was passed from Mr. Nutter to Slim Quisenberry, or M. A. Quisenberry, and it did not have anything on the bottom. Mr. Quisenberry asked me what organizations I belonged to, if I belonged to a union.

(Testimony of Sidney W. Bailey.)

Q. He asked you that? A. Yes, sir.

Q. And what did you tell him?

A. I told him that I had a union book, yes, but my dues weren't paid up to date.

Q. Now, did you write in the bottom here what I have just read, or did someone else?

A. Mr. Quisenberry handed it back to me and asked me if I would put it in there, which I did, and handed it back to him.

Q. And he asked you whether or not you belonged to a union organization?

A. That is right.

Q. Did you have any other union discussion with Mr. Quisenberry before your discharge?

A. At that same time that we were discussing this employment [152] sheet that you have there, he definitely told me that he did not want it union and I said, "Well, I belong to the union but I won't cause you any trouble," in which I never have up until I signed a complaint against them after I was fired. [153]

* * * * *

ALFRED JENSON

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Doyle: Give us your name and address, please, and speak up good and loud. Mr. Jenson.

(Testimony of Alfred Jenson.)

The Witness: Alfred Jenson, 850 Calleantonia.

Q. (By Mr. Schoolfield): All right, Mr. Jenson, where are you employed?

A. Texas Independent Oil Company.

Q. How long have you been so employed?

A. Since the 16th day of April, 1953.

Q. All right. Did you ever have a conversation with Mr. Quisenberry in which Mr. John Cox was present?

A. Yes, sir.

Q. Will you tell the Examiner what was said at that time and when it was.

Trial Examiner Doyle: Let's us fix the date first so we can have that straight. Let us fix the date as to the best of your recollection, and then we will get the conversation.

Q. (By Mr. Schoolfield): When did you have the conversation?

A. Is that in regard to Johnny Cox's hiring on the job?

Q. That is correct.

A. Well, it was in Lordsburg, New Mexico, on approximately the [165] 17th or 18th of April.

Q. 1953? A. Yes, sir.

Trial Examiner Doyle: You place it a couple of days after you went to work, is that it?

The Witness: Oh, wait, it was more than that. It was possibly the 20th. I think I called him one day and he came down the next.

Q. (By Mr. Schoolfield): You called who?

A. Johnny Cox.

Q. And he came down the next day?

(Testimony of Alfred Jenson.)

A. Yes, sir.

Q. And you were already working?

A. Yes, sir.

Q. Did you introduce Mr. Cox to Quisenberry at that time?

A. No, sir, Johnny Cox was in Phoenix.

Q. And were you present when Johnny Cox and Quisenberry and yourself were all together at one time?

A. Yes, sir.

Q. And what did Mr. Quisenberry say to Mr. Cox then?

A. Well, I introduced him to Mr. Cox and they went on talking from there and he asked Johnny, which I had told Johnny to say that he wasn't in the union, because Johnny is a good man and I wanted him to have the job. So I knew Johnny wouldn't hurt the job. So he told Mr. Quisenberry that he was not in the union, [166] that he had went delinquent in '47.

Q. I see. You had a conversation with Mr. Quisenberry about John Cox before that, hadn't you?

A. Yes, sir.

Q. What did Mr. Quisenberry ask you about Cox at that time?

A. He asked me if he was in the union and I told him no, that he had went delinquent in '47.

Q. I see. Now, do you remember a conversation in which Mr. William Turner, William Johnson and yourself, and Mr. Quisenberry entered into a conversation?

A. Yes, sir.

(Testimony of Alfred Jenson.)

Q. Will you tell the Examiner approximately when that was.

A. Well, about the 25th of April we was out at Truck 66 and Bill Turner and Bill Johnson come out to the truck stop and Bill Turner introduced Bill Johnson to Quisenberry there and we was standing out at the corner of the building when we were discussing the job. Slim Quisenberry told Johnson that—asked him if he was in the union and Johnson said, “Yes” he had been working for Cantlay & Tansola and he said, “Well, that is all right, just so long as there is no trouble,” that he didn’t want the union and it wouldn’t be union, and he didn’t want it and as long as it didn’t cause no trouble, it would be all right.

Q. Is that all you remember of that conversation at that time about the union?

A. Well, yes, that is about all that was said about the union. [167]

Q. Now, Mr. Jenson, when you hired in, did Mr. Quisenberry question you about the union?

A. Yes.

Q. Will you tell us when that was?

A. It was about April 12 and I went out to Bill Turner’s and Mr. Quisenberry was at Turner’s house, out in front of the house talking to Bill Turner. So I just stood there for a little while and listened and finally I got in the conversation, and Mr. Quisenberry asked me if I was a truck driver, in which I just made the remark saying I had been paid for years doing that job, and he asked me if

(Testimony of Alfred Jensen.)

I would like a job, and I said that I would like time to talk it over, think it over and talk to Turner about it. So he said, "All right." He said that the truck was No. 9 and it was parked back of his house, and we went over and looked at it.

Q. Did he ask you if you were in the union at that time?

A. I told him I joined in 1935. He said, "I don't want any union members" so I said that I was delinquent three years ago and I wasn't in the union.

Q. And you were hired, is that correct?

A. Not right at the moment, no, sir.

Q. When did you go to work?

A. The 16th day of April. [168]

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WILLIAM E. TURNER

a witness called by and on behalf of the General Counsel, having been first duly sworn, was examined and testified as follows: [178]

Direct Examination

Trial Examiner Doyle: Give us your name and address and speak up real loud.

The Witness: William E. Turner, 11935, Guard Avenue, Norwalk, California.

Q. (By Mr. Schoolfield): Mr. Turner, were you employed prior to May 1, 1953, with the Texas Independent Oil Company? A. Yes, sir.

Q. How long did you work for the company?

A. Oh, from April 13 to May—it was about 30 days.

(Testimony of William E. Turner.)

Q. You worked about 30 days?

A. About 30 days.

Q. Mr. Turner, would you tell the Examiner whether or not you road tested Mr. Richins?

A. Yes, I did.

Q. Mr. Turner, how long have you been driving a truck? A. Well, about eight years.

Q. You have been driving diesels during that time? A. Most all of it has been diesels.

Q. You have had eight years of diesels?

A. Yes, sir.

Q. And you road tested Mr. Richins?

A. Yes.

Q. Would you tell the Examiner what type of driver Mr. Richins was?

A. He surprised me not to have much more trucking experience [179] than he said he had and he was very good with the gears. It was over terrain where you had to use gears quite a bit and he was exceptional.

Q. Did Mr. Richins at all manhandle gears?

A. No, he was very smooth with the gears.

Q. When did you first talk with Mr. Quisenberry about a job, Mr. Turner?

A. April 13, 1953. It may have been a little before that. I think it was a day or two before.

Q. Did he ask you about the union at that time?

A. Well, he asked me if I belonged to the union.

Q. What did you tell him.

A. I told him yes, I did.

(Testimony of William E. Turner.)

Q. Now, did he go any further in union discussion with you at that time?

A. Well, this was over the phone. He said he didn't want any union drivers, and I told him that he didn't want me then. He said to come over to his house and talk to him anyway.

Q. Now, did you discuss union drivers with Mr. Quisenberry after that during your employment?

A. Well, he asked me to get drivers that weren't union if I could, but I told him this part of the country you can't always find them. And he said, "Well, just looks like we will have to get men who are union. We have to have drivers."

Q. Did you talk to Mr. Quisenberry about a job for William [180] Johnson? A. Yes, I did.

Q. Were you present when Mr. Quisenberry talked to Johnson? A. Yes.

Q. What did Mr. Quisenberry say?

A. Well, he asked Mr. Johnson where he had worked and Johnson told him in Cantlay & Tansola, and asked him if he was union and he said he had to be to work for Cantlay & Tansola. And he said, "Well," the exact words, "you can go to work but just quit paying dues on that card."

Q. And that is just about what he said to Mr. Johnson? A. That is what he said.

Q. Was anyone else present at that time besides Johnson?

A. Al Jenson was present at that time.

Mr. Schoolfield: I pass the witness.

(Testimony of William E. Turner.)

Cross Examination

Q. (By Mr. Langmade): Mr. Turner, you were actually the first employee that was hired by Mr. Quisenberry, were you not?

A. In Tucson, yes.

Q. That was when the operation began?

A. Yes, that was when the operation began.

Q. And you say that he hired you notwithstanding the fact that you had said, "Well, then, if you don't want union men, you don't want me"?

A. He didn't hire me then. He hired me later, later that [181] same day.

Q. Later that same day; you were still the first employee to go to work on this new operation or new unit that was being set up and that is set forth in the complaint here? A. Yes, sir.

Q. And you worked with the Texas Independent Oil Company until when?

A. Around the 1st of May, sometime, right around the 1st of May.

Q. Then you resigned of your own volition?

A. Yes, I did.

Q. Not because of any union activity or non-union activity? In other words, that wasn't the reason why you quit.

Mr. Schoolfield: Mr. Turner is not in the complaint as an 8 (3).

Q. (By Mr. Langmade): Your answer was no?

A. No; yes.

Q. Now, you say you road tested Mr. Richins. How many times did you road test Mr. Richins?

(Testimony of William E. Turner.)

A. I road tested Mr. Richins one time.

Q. I believe you testified he hadn't any experience in driving this heavy type of equipment?

A. This type of equipment.

Q. Now, will you say that one test drive is sufficient in your opinion to fully qualify him to know how to shift gears? [182]

A. Well, under the circumstances, yes, because he was so good with the gears. So many people are just naturally born to this and some people never get it. [183]

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ROBERT G. DAYTON

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Doyle: Will you give us your full name and address, please?

The Witness: Robert G. Dayton, 2438 North Estrella Avenue, Tucson.

Trial Examiner Doyle: All right, Mr. Dayton, will you answer the questions of counsel, and keep your voice up.

Q. (By Mr. Schoolfield): Mr. Dayton, where are you employed?

A. Texas Independent Oil Company.

Q. When did you go to work for the company?

A. May 15, 1953.

Q. What are your duties?

(Testimony of Robert G. Dayton.)

A. Driving a truck.

Q. The same type of truck as the rest of the witnesses? A. Yes, sir.

Q. When did you first contact Mr. Quisenberry about a job, Mr. Dayton? [189]

A. I believe it was the 12th or 13th of May.

Q. Do you recall what Mr. Quisenberry said to you at that time?

A. Yes, I saw Mr. Quisenberry at the 84 Truck Stop and he got in the car with me and I asked him for a job and he asked me if I belonged to the union. I told him no, that I was delinquent and I guess I had been dropped.

Q. What else did Mr. Quisenberry tell you at that time?

A. He told me that he was running a strictly non-union job and he wanted no one that belonged to the union.

Q. Did Mr. Quisenberry say anything at that time about discharging men who did belong to the union? A. Yes.

Q. Would you repeat that conversation, please?

A. Well, he said that he was running a non-union job and if anyone of these boys joined up with the union, well—I can't repeat it verbatim—but he said he would discharge them.

Q. Was the gist of this conversation repeated anytime thereafter? A. Essentially, yes.

Q. When was this?

A. Well, on occasions, I can't give dates because there were several different occasions.

(Testimony of Robert G. Dayton.)

Q. Now, the first conversation was around May 11th, you testified, is that correct, sir? [190]

A. 11th or 12th, somewhere along there.

Q. And when did you go to work for the company? A. May 15th.

Q. Did you have a conversation with Mr. Quisenberry on May 15th? A. Yes.

Q. Would you repeat that conversation?

A. I was at his house and he asked me again if I wanted to go to work, and I called him up and said I was ready to go to work, and he said I could go to work. And he asked me to fill out an application form, and some of the fellows came in and he reiterated he wasn't hiring any union help, he wasn't going to have them on the job, and if they were, they didn't need to apply.

Q. Now, Mr. Dayton, were you ever told by Mr. Quisenberry not to turn in your tach charts?

A. Several times.

Q. Now, do you recall on any particular truck?

A. Yes, on No. 3.

Q. When were you told on No. 3, can you recall?

A. I believe it was in front of the 84 Truck Stop, around the fuel pumps there.

Q. What time of the year, do you recall?

A. Well, it was, I believe, in May, the latter part, possibly.

Q. Now, what was the next truck? [191]

A. Well, I am not giving you the trucks in order.

Q. That is all right.

(Testimony of Robert G. Dayton.)

A. No. 9 and No. 7, I do believe.

Q. And were you told substantially the same thing on each one of these trucks, is that correct?

A. He told me, well, his phrasing was, "Get rid of that damn tach chart."

Q. I see. Now, do you recall a conversation with Mr. Quisenberry on or about September 8?

A. Yes.

Q. Would you tell the Examiner how this conversation came about?

A. I got in late that morning and Mr. Nutter called me up and told me to be over at the 84 Truck Stop, that I had to call Mr. Quisenberry just as soon as possible. I hurried over there and he said, "Well, I want to talk to Al Jenson, too," and I said, "O. K., I will wait until Al gets here and we will make one call." I don't recall who placed the call, but anyhow I called Mr. Quisenberry first and he told me, "I want you to lay off for a few days."

Q. What did you say?

A. I asked him if there was any particular reason, that I couldn't afford to lay off.

Q. Go on.

A. I said you must have a reason. He said, "Yes, it is about [192] those applications you have been passing around and those tach cards." I said, "I have told you about all tach cards. Now, what applications are these?" He said, "Well, those applications you have been passing around." I suppose he meant the union applications because I gave one

(Testimony of Robert G. Dayton.)

of the other drivers an application when he asked for it.

Q. Did you have a telephone conversation with Mr. Quisenberry around the 10th of September?

A. Yes, he called me at my home at about noon, perhaps a little after, and asked me if I would contact the rest of the men that had been laid off that worked on the other end of the job. He said, "Get them all," to call them over to the 84 Truck Stop, that he wanted to talk to everyone of them. I asked him what was up and he said, "Well, we are going back to work just the same as we have been." And I said, "Does that mean everybody?" And he said, "Yes, could you get ahold of Chester Johnson?" And I said, "Yes." He asked me about Jenson and Saner, and I told him I would see that they was got ahold of.

Q. What else did you say to Mr. Quisenberry?

A. I asked him what was wrong, and he said it was this damn union deal. I said, "Oh, that is what has been bothering you." I said, "How come you laid us all off?" He said, "Well, I got some bum information from a damn lawyer," or something like that.

Trial Examiner Doyle: I didn't get that? [193]

The Witness: He said something like, "I got some bum information from a damn lawyer," or something like that. That was the general tone of it.

Q. Did you have any more conversations with him at any time?

(Testimony of Robert G. Dayton.)

A. Not that I can recall. That was essentially the most of it.

Q. Did you have a conversation with Mr. Quisenberry about Mr. Steele?

A. Well, I have had several conversations with him about Mr. Steele.

Q. About when was it you had one of these conversations?

A. I couldn't give any definite dates as to when. There were times when he said the Old Man wasn't going to have this a union job and the Old Man said this and the Old Man said that. I asked him one time what Mr. Steele looked like and he told me. He said he is a hard headed old son of a bitch and he is not going to have this a union job, and he said if he has to go, he will jack these trucks up and let them sit.

Q. Did you have a conversation with Mr. Quisenberry in which he explained the reason for Mr. Steele's attitude?

A. Well, yes, I do remember something like that.

Q. Can you place the approximate time of the month when this conversation took place?

A. No, because we had several conversations. We all met at one place and visited and talked, and as for time and dates, I [194] couldn't tell you, but I asked him one time particularly why——

Mr. Langmade: Just a minute, I believe I am going to object unless he gives us the approximate dates.

Trial Examiner Doyle: Yes, I think that is true,

(Testimony of Robert G. Dayton.)

and there is another point on this, too. I don't think we ever had it clear in this record what Mr. Steele had to do with this company. There has been reference to "The Old Man" and to Mr. Steele, but if he is not an official of the company or an owner or backer or something, of the company, this stuff is irrelevant. We ought to have it clearly stated here as to what Mr. Steele has to do with the company.

Mr. Schoolfield: Can we stipulate Mr. Steele owns the company?

Mr. Langmade: No, it is a corporation.

Mr. Schoolfield: Can we stipulate he is a stockholder?

Mr. Langmade: He is a stockholder, yes.

Mr. Schoolfield: Let us go off the record, please.

Trial Examiner Doyle: Off the record.

(Discussion off the record.)

Trial Examiner Doyle: On the record.

Mr. Schoolfield: General Counsel solicits a stipulation to the effect that Horace Steele is vice president of the Texas Independent Oil Company.

Mr. Langmade: It is so stipulated.

Trial Examiner Doyle: And he is also referred to as "The [195] Old Man," "Old Man Steele," or some expression such as that.

All right, now let us get the approximate date of these conversations. I either suggest the witness to connect them up with prior to his discharge or at the time he began, or something of that sort.

Q. (By Mr. Schoolfield): Mr. Dayton, can you

(Testimony of Robert G. Dayton.)

give us the approximate time of the year when you had the conversation about Mr. Steele?

A. Well, I could give you any date, possibly from May 15 until May 30.

Q. In that period there?

A. In that period, sometime along there.

Q. And would you repeat the conversation about Mr. Steele?

A. Well, he said Mr. Steele was a hard headed old gentleman, and that he wasn't going to have this union regardless. If he had to, he would jack these trucks up and leave them sit.

If I may add, he repated that on another occasion.

Q. Do you recall when that was?

A. Yes, that was during the telephone conversation of approximately September 8th to the 12th.

Q. You mean which conversation, the conversation on the 8th or your conversation on the 10th?

A. On the 10th.

Q. Your conversation on the 10th?

A. On the 10th. No, I beg your pardon, that would have been [196] the conversation on the 11th.

Q. You had a conversation with him on the 11th, too? A. Yes.

Q. Then you testified you had a telephone conversation with Mr. Quisenberry on the 8th, the 10th and the 11th? A. That is right.

Q. Would you repeat the conversation of the 11th?

A. I called Mr. Quisenberry and asked him

(Testimony of Robert G. Dayton.)

where the truck was. As yet I had no information, no concrete information that I was back on the payroll, and he told me so. He said, "Yes, your truck is laid up." I said, "Well, what in the world is going on? You tell me we are on the payroll, but no truck shows up. Can you tell me what has happened?" He said, "Well, it is over this damn union deal." He says just because the Old Man spent, well, he says, just because the Old Man spent \$30,000 apiece for these trucks, or something like that, don't think that he is going to let this go union, he will jack them up and take the tires off them and let them sit if he has to. [197]

* * * * *

MERRILL E. NUTTER

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows: [202]

Direct Examination

Trial Examiner Doyle: Will you have a chair, please, and give us your name and address?

The Witness: M. E. Nutter, 430 East Lee, Tucson.

Q. (By Mr. Schoolfield): Where are you employed, Mr. Nutter?

A. Texas Independent Oil Company.

Q. What are your duties?

A. I drive a transport.

Q. When did you first go to work for the Texas Independent?

(Testimony of Merrill E. Nutter.)

A. I don't recall the exact date that I went to work. It was the fore part of May that I actually went to work and the latter part of April that I took my student run.

Q. Did you have a conversation with Mr. Quisenberry when you took your student run, or before?

A. I don't recall that I had one the day that I took my student run. I did prior to that.

Q. Would you tell the Examiner what Mr. Quisenberry said to you then?

A. It was explained to me that he was running a non-union job and asked if I belonged to a union and I told him no, I had never belonged to a union. And I believe that aside from the fact that he stated he wanted to keep it a non-union job, that consisted of the conversation.

Q. Did he say anything more about the union at that time?

A. As I recall it, no. [203]

Q. Did he say anything about hiring and firing men at that time?

A. I don't recall that he did right at that time, no.

Q. Did he say anything to you later about hiring and firing men? A. Yes.

Q. When was this?

A. Somewhere, I would say either the latter part of May or the fore part of June, in a conversation that we had it was stated by Mr. Quisenberry that you could not fire a man for union activities,

(Testimony of Merrill E. Nutter.)

but there were numerous other reasons that he could be discharged for.

Q. Was that the extent of his conversation at that time?

A. To the best of my knowledge, yes, as far as the union was concerned. We may have talked of other things, but as far as the union was concerned, yes.

Q. Now, Mr. Nutter, aside from your duties as truck driver, did you have any other capacity or do you have any other capacity with the company?

A. That is the \$64 question. Just now, I don't know. I guess I am just a driver.

Q. Did you ever take application blanks from other drivers, Mr. Nutter?

A. I have yes.

Q. Will you tell the Examiner your instructions from Mr. [204] Quisenberry as to the method of taking these application blanks and how you were supposed to instruct the men in dealing with them and filling them out?

A. When I first started taking applications, all of the applications were filled out as to the name and address, education, where they had worked prior to here and who their former employers were, and so forth, sir. Later on I was instructed, on the front side of the sheet, as I recall it, the bottom line, asked what organization they belonged to other than fraternal, religious, and so forth, and I was instructed to ask the men if they had ever belonged

(Testimony of Merrill E. Nutter.)

to a union, and if so, say so, and if they were on a withdrawal card, they wanted that, too.

Q. And they wanted that affirmatively stated?

Mr. Langmade: Wait just a minute here, I object to the statement "They wanted."

A. By "They," Mr. Quisenberry or the company.

Mr. Langmade: Did you have a conversation with——

Trial Examiner Doyle: Just a minute. The objection is sound here now. I understand the instructions were given by somebody, but who gave the instructions to proceed that way?

The Witness: That is easy to answer. It was Mr. Quisenberry.

Trial Examiner Doyle: Now, one thing I am not clear about, too, when you were asked to do this, was it because you had some [205] sort of supervisory function there, or were you some sort of a straw boss or personnel man?

The Witness: Yes, I think that is right.

Trial Examiner Doyle: In addition to your truck driving duties?

The Witness: It is kind of a mixed-up situation.

Trial Examiner Doyle: That is what we want to have.

The Witness: I guess you could call me a straw boss. At one time I guess I had the authority to take applications, and I was told at one time I even had the authority to hire and fire.

Trial Examiner Doyle: And it was during the

(Testimony of Merrill E. Nutter.)

time that you had such authority that one of your functions was to see about these applications?

The Witness: That is right.

Q. (By Mr. Schoolfield): Now, Mr. Nutter, when was this authority taken away from you?

A. It was taken away, I don't know exactly what time. It was the latter part of May or the fore part of June that I was working at this and it was kind of haphazard-like. Once I was relieved of those duties and went back to driving, and then I was replaced.

Q. When were you replaced, do you recall?

A. I don't recall the exact date. It was in the middle of the summertime.

Q. Do you have that authority now? [206]

A. Awhile ago I said that it was the \$64 question. I believe it was on the 7th day of September that authority was given back to me and has never been taken away from me, but I don't feel that I still have it. [207]

* * * * *

Q. (By Mr. Schoolfield): Mr. Nutter, do you recall a conversation with Mr. Quisenberry about the union activities of the other drivers?

A. Only one man that I recall now, possibly two.

Q. Can you recall approximately when these took place with the first man?

A. I think it was the latter part of May and the man we were discussing—would you be interested in who we were discussing?

Q. Yes.

(Testimony of Merrill E. Nutter.)

A. The man we were discussing at that time was Al Jenson. [212]

Q. What did Mr. Quisenberry ask you then or say to you then? Do you recall his approximate words?

A. I believe that he asked me this way, did I know that Al was a member of the union.

Q. And what was your answer?

A. I told him, "No," that I did not know.

Q. Now, who was the second man?

A. I believe the second man that we talked about, as far as the union was concerned, as I recall, I believe this man's name was Bill Richins from Lordsburg.

Q. Richins? A. Yes, that was it.

Q. Did that man testify in this court room yesterday? A. Yes, sir.

Q. And his name was Richins?

A. It is a name similar to—it is Richins or Richards.

Q. Did that man testify yesterday?

A. He did.

Q. Now, when did this take place, if you recall?

A. I believe that was in the latter part of May or the fore part of June.

Q. Now, what did Mr. Quisenberry say to you then? A. Well—

Mr. Langmade: Just a minute, I object because the record shows that Mr. Richins was discharged on May 25th. [213]

Mr. Schoolfield: This witness has testified as

(Testimony of Merrill E. Nutter.)

near as his recollection, the latter part of May or the early part of June, and that would take in a reasonable amount of time. It could have been before discharging Mr. Richins.

Trial Examiner Doyle: I will overrule the objection. Let us hear what was said. If it developed it was later after his discharge, I will entertain a motion to strike.

Q. (By Mr. Schoolfield): What was said?

A. I was asked if I knew that this man was a member of the labor union or was agitating in any way.

Q. And what did you say to that?

A. I said that I was afraid that he did belong to the union, was my answer.

Q. You were afraid that he did belong?

A. Yes, sir. [214]

* * * * *

M. A. QUISENBERRY

a witness called by and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Doyle: Will you please state your name and address?

The Witness: My name is M. A. Quisenberry, 3717 Pershing Drive, El Paso, Texas.

Trial Examiner Doyle: All right, Mr. Langmade.

Q. (By Mr. Langmade): Mr. Quisenberry, by whom are you employed?

A. Texas Independent Oil Company.

(Testimony of M. A. Quisenberry.)

Q. And what is Texas Independent Oil Company; is it a corporation, a partnership, or what?

A. It is a corporation.

Q. And are you generally familiar with the business of the Texas Independent Oil Company?

A. Yes, sir.

Q. And what business are they engaged in, generally speaking?

A. Distribution of petroleum products.

Q. And where are the petroleum products distributed?

A. In Arizona they are distributed in Tucson, Phoenix, Casa Grande, Bisbee.

A. And what points do they obtain for distribution in Arizona?

A. El Paso, Texas, Standard Oil Refinery.

Q. Any other points?

A. At Sypress, California, Standard Oil Company refinery.

Q. In California that is Standard Oil of California and here it is Standard of Texas?

A. That is right.

Q. Now, what is your capacity with the company?

A. Well, I am in charge of the trucks, I am in charge of seeing that the gasoline gets hauled to the points of distribution.

Q. From and to what points?

A. From El Paso, Texas, to any points in Arizona.

Q. And when were you employed?

(Testimony of M. A. Quisenberry.)

A. With Texas Independent Oil Company, I was employed about March 15th—16th, I guess.

Q. Of which year? A. 1953.

Q. And prior to that time, by whom had you been employed?

A. Alabama Freight Lines.

Q. What business is Alabama Freight Lines in?

A. Freight, interstate freight.

Q. How long had you been employed by them?

A. Well, the last time, three years.

Q. And what was your capacity with the Alabama Freight Lines?

A. I was the agent or manager of the Clarksdale terminal for the Verde Valley in northern Arizona.

Q. As such, did you have duties in managerial capacity? A. Yes.

Q. And did that include the hiring and firing of men? A. Yes.

Q. And is Alabama Freight Lines—their employees, are they all union? A. Yes, sir.

Q. And could you hire an employee for Alabama Freight Lines that was not a union man?

A. I had to ask him.

Q. And why was that?

A. Well, if he wasn't a union man, I couldn't hire him.

Q. And then I believe you state that it was March 15th that you were hired by Texas Independent Oil Company? [223] A. Yes, sir.

Q. And what were your duties to be?

(Testimony of M. A. Quisenberry.)

A. To operate the trucks, to see that the gasoline was distributed, to take care of the transportation part of the distribution of the petroleum products.

Q. From and between what points?

A. El Paso, Texas, and points in Arizona.

Q. Had there been any operation of Texas Independent Oil Company prior to the time you were employed in transporting gasoline between El Paso, Texas, and Arizona points? A. No, sir.

Q. And what did the company instruct you to do? In other words, after you were first employed, what did they instruct you to do?

A. Well, my first instructions were to go down to El Paso and make arrangements with Standard Refinery to start loading our trucks, and so forth, and see about places of getting fuel and contacting some drivers, and I was going to operate it from Tucson, to start with. We were just merely trying to see what was going to be the best way to operate and the best place to operate from when we first started this. And I have made a lot of changes.

Q. Just a minute now, was there anyone else helping you, or were you the sole charge and authority?

A. I was in sole charge and authority; nobody has helped me.

Q. And then you did proceed to set up this operation? [224] A. Yes, sir.

Q. And also to employ men; is that correct?

A. Yes, sir.

(Testimony of M. A. Quisenberry.)

Q. And there has been some testimony on application forms here; did you secure those application forms? A. Yes, sir.

Q. Where did you get them from?

A. I got them at a stationery store here in Tucson; I bought them.

Q. And was anyone directing you to get them or was that your idea? A. It was my idea.

Q. And then there has been testimony to the effect that you asked the men to fill out that application? A. Yes, sir.

Q. And also testimony to the effect that under, "Religious and Civic Organizations," that in addition thereto you requested the men to fill in their union affiliation if they had any.

A. I admit that charge, I did.

Q. And you did do that?

A. Yes, sir.

Q. And how long did you continue to do that?

A. Well, I don't remember the exact date, possibly it was around the 15th of June, around the 15th of June when you phoned me and told me that that was an unfair labor practice, cut [225] it out, don't do it.

Q. And from that time on, have you been requiring on applications that have been filed from men, for them to state their union membership?

A. No, sir, I haven't asked them that.

Q. Were you familiar with the National Labor Relations Act? A. No, sir.

Q. And prior to June 15, had anyone instructed

(Testimony of M. A. Quisenberry.)

you as to what you should do in hiring men or the questions you should ask them? A. No, sir.

Q. That was all done by yourself on your own authority as working for the Texas Independent Oil Company? A. That is right.

Q. Now, I believe, Mr. Quisenberry, that Paragraph 8 of the complaint states as follows:

“Respondent, through its offices, agents and employees, from on or about April 11, 1953, to date has interrogated its employees concerning their union affiliations; has threatened and warned its employees to refrain from assisting, becoming members of or remaining members of, the union; has kept under surveillance the meeting places, meetings and activities of the union or the concerted activities of its employees for the purpose of self-organization or improvement of working conditions * * *”

Now, in particular, I will ask you whether you have kept under surveillance the meeting places, meetings and activities [226] of the union?

A. No, sir, I never did.

Q. Did you know of any meetings that were being held? A. No, sir.

Q. Have you ever heard of any meetings being held? A. No, sir.

Q. Now, Mr. Quisenberry, with reference to the testimony of Harry Almada, you were here in the hearing room yesterday and heard his testimony?

A. Yes, sir.

Q. And Mr. Almada stated that on or about the

(Testimony of M. A. Quisenberry.)

11th day of April that you stated to him, and this was prior to the time that he went to work, that you were hiring nothing but non-union men, do you remember that conversation?

A. Yes, sir, I do.

Q. Was that the conversation?

A. I did say until we got all the trucks moved down here that we were going to move and get our new trucks in process and that I would rather it be non-union until we got into operation. I have said that several times, and now, I have said several times I don't care, it doesn't matter either way to me now.

Q. Since when have you been saying that it doesn't matter?

A. Oh, since about the middle of August. We don't have delivery on all of our trucks yet.

Q. I believe you also testified that you stated he should get [227] a withdrawal card at that same conversation on April the 11th. Do you recall any conversation to that effect? A. No, I don't.

Q. And also that you stated that you didn't want any trouble created?

A. I did say, "I want a smooth operation, I don't want any bickering back and forth until we get this thing going; I want it to be as smooth as possible because it is very confusing to start with, anyhow."

Q. And then you did employ Mr. Almada; is that correct? A. Yes, sir, I did.

Q. And he went to work for the company as

(Testimony of M. A. Quisenberry.)

a driver? A. Yes.

Q. And then on or about the 3rd day of June, 1953, he was dismissed; is that correct?

A. Yes, sir.

Q. And you heard his testimony yesterday that he had been told by you that tires should be bumped. Do you remember when and where you had that conversation with him? A. Yes.

Q. When and where was that?

A. The first time he ever drove one of our trucks I was riding with him.

Q. Do you remember about when that was?

A. It was the day I hired him. [228]

Q. That would be at the beginning of the operation around the middle of April?

A. That was the first truck I brought down from Phoenix to put on this highway.

Q. Now, you were in the truck riding with him?

A. We were going from Lordsburg to El Paso to pick up a load of gas.

Q. All right. What was the conversation?

A. The conversation, we were discussing back and forth—Harry knows quite a lot about trucks and I could tell that he had been around trucks practically all of his life, and we were discussing back and forth the merits and demerits of certain trucks, and I said, "I think the tires on these trucks should be bumped at least every 60 or 70 miles."

Q. What was his reply?

A. He said, "That is a good idea; I think that is what had better be done." So consequently all

(Testimony of M. A. Quisenberry.)

drivers bumped their tires. Of course, that is what all drivers do. When they first get on the truck that is what they all do.

Then the drivers were bumping the tires in El Paso and Deming and——

Q. Were you giving them any specific instructions as to what points they should be bumped?

A. Yes, I said Deming and the refinery and, of course, Lordsburg. [229]

Q. All right. You heard this testimony yesterday as to where he did bump these tires and where they finally found out it was smoking, and how many miles that was.

A. Yes, it was approximately 20 miles the other side of Deming when this tire burned out, and he didn't stop in Deming and bump his tires, so he had come approximately 80 miles.

Q. Did you see the tire? A. Yes, sir.

Q. You saw the tire after it was brought back. Where was it brought to?

A. I saw it lying beside the road. I was in El Paso at the time this happened, at the Paso Del Norte Hotel. I drove up there. As he was in the refinery, I drove up there. I saw the tire lying beside the road.

Q. Did you stop and look at it?

A. I sure did.

Q. What was the condition of the tire?

A. It was burned up.

Q. Now, Mr. Almada testified he was driving empty? A. That is right.

(Testimony of M. A. Quisenberry.)

Q. Now, from your experience with trucks, do you know how long it would take for a truck that was being driven empty on a dual tire to get in the condition that that tire was?

A. Approximately.

Q. What would that be. [230]

A. That tire would have to be flat for 35 miles, especially with it empty. Now, if it had been—now, on an empty trailer, pulling down the road in the cool of the early morning hours, he had to drive a long ways with that tire flat to burn it like that.

Q. Mr. Quisenberry, what is the cost of one of those pieces of equipment?

A. Around \$30,000.

Q. This is the truck, I take it, the whole truck and trailer? A. Yes, sir.

Trial Examiner Doyle: Cab and trailer?

The Witness: Yes, sir.

Q. (By Mr. Langmade): And in the event that tires aren't bumped, is it true what Mr. Almada said, that when you do stop, they will not catch fire when you are going but when you stop they will catch fire?

A. They will catch fire when they are running if you run them long enough.

Q. And is it also true that when you stop, that increases the likelihood of their catching fire?

A. It does, yes.

Q. Is that one or is it not of the more important things of a truck driver's duties.

A. That is one of the most important things,

(Testimony of M. A. Quisenberry.)

taking care of the equipment. That comes under taking care of the equipment. [231]

Q. And do you remember what date it was that that occurrence with Mr. Almada happened? To further refresh your memory, when was the next time you saw him after that happened?

A. I can't say when the next time was I saw him, I believe it was here in Tucson, but I fired him by telephone.

Q. Well, what time did you see the tire?

A. About 10:00 o'clock a.m.

Q. And then you did fire him on the same day?

A. On the same day.

Q. Then if the record disclosed that he was discharged on the 3rd day of June, would that be the day?

A. That would be the day, yes, sir.

Q. Then what did you do?

A. I came all the way to Tucson and I had already seen the tire, and I called Harry when I knew he had time to make his run and get his rest, and before the next truck went out, I called him and I said, "Harry, I am going to have to let you go because of that tire." And he said, "I take it I am fired for union activities?" And I said, "No, Harry, you are fired because you burned up a tire and left it lay beside the road because it was so damn hot you couldn't get it back on the tire rack."

Q. Did you ever talk to him after that?

A. Yes, I talked to him once after that here at Tucson out at the 84 Truck Stop. [232]

(Testimony of M. A. Quisenberry.)

Q. Did Mr. Almada recommend other employees to you? A. Yes, he did.

Q. And I believe he testified he recommended E. W. Richins and also Herschel Beeson; is that correct?

A. Now, I don't know whether he recommended Herschel or not, but he did recommend Bill Richins and Joe Delgado and Harry Paine to me.

Q. And did you employ those men?

A. Yes, I did.

Q. Was there anyone that he recommended to you that you didn't employ?

A. No, I don't think so. I thought a lot of his judgment on test hopping these drivers. I still do, for that matter. And the men he recommended to me had been good men.

Q. Mr. Almada also testified regarding your instructions on speeding. Now, do you remember having any conversation with him about the miles per hour the trucks were to travel? A. Yes, sir.

Q. When was that?

A. When I first brought those trucks down here.

Q. When was it, sir? A. Sir?

Q. Approximately when?

A. The first of April, approximately. [233]

Q. You had a conversation with him at that time?

A. Yes, sir, the first trip we were discussing speed.

Q. This is the same trip you are talking about

(Testimony of M. A. Quisenberry.)

in which you were in the cab of the truck with him?

A. Yes, sir, the first trip, the day I hired him. We were discussing speeds when I said that I thought 55 miles an hour would be a good speed for these trucks on the road. And he said he thought that was fast enough for a load of gasoline. And we discussed it back and forth and so we said 55 miles an hour would be the speed on the trucks.

Q. There was testimony that at one time you changed the base of operations from Tucson to El Paso; is that correct?

A. It is still that way, it is down in El Paso now. The base operations are in El Paso.

Q. And you moved the trucks from Tucson to El Paso; is that right? A. Yes, sir.

Q. And he testified that you said he exceeded the speed limit.

A. No, I went down with all the drivers that night with the exception of one. I had to hold up one truck because the fan was about to come off it.

Trial Examiner Doyle: Let us take a three-minute recess at this point.

(Short recess.)

Trial Examiner Doyle: All right, on the record. The hearing will be in order.

Q. (By Mr. Langmade): You were testifying, Mr. Quisenberry, about the time the fleet was moved, and you said, you came with them with the exception of one man.

A. Yes, I had to hold No. 5 that night. I didn't

(Testimony of M. A. Quisenberry.)

know that there was anything wrong with it and one of the boys, I believe it was Bob Dayton, was just checking the truck over before it went out and he was not going to go but he was helping the guys look the truck over and he happened to find the fan on No. 5 that was about to fall off. And it would have gone through the radiator. So I held it up to have it fixed the next morning. And I had sent Stewart Seymour on No. 15 and I took my car and caught him and brought him back and took No. 5 and put Bailey on No. 15. Now, when I moved this operation down there, I put pretty near all the drivers where they wanted to be, I gave pretty near all of them their choice of whether they wanted to pull from El Paso to here or from here to Phoenix, the older drivers, and No. 15 was running late that night, so I told Mr. Bailey that I would take the chart out of the truck so he could catch up with the rest of us. And he did catch up with the rest of us, the rest of the trucks. The other trucks were running 55 miles an hour and he was running approximately 60 or 65.

Q. What is the speed limit you now have in effect? A. Fifty miles an hour.

Q. Do you have good road conditions between El Paso and Arizona [235] points?

A. Some of the road conditions, we have some roads that are really good, and other stretches for a stretch of 15 miles is bad. It varies.

Q. Now, Mr. Quisenberry, with respect to William J. Johnson, you are acquainted with him?

(Testimony of M. A. Quisenberry.)

A. Yes, sir.

Q. He was one of your employees?

A. Yes, sir, he was.

Q. And did you ever discharge Mr. Johnson?

A. No, I didn't fire Bill.

Q. Did you have a conversation with him?

A. I had several conversations with him.

Q. Do you remember when he was employed?

A. The exact date, no, sir, I don't.

Q. Was it true he was with the company about 10 days to three weeks?

A. Approximately three weeks he worked for the company.

Q. And the record shows he was discharged on May 15, 1953; is that correct?

A. That is approximately the last time I saw him. He just didn't come back.

Q. And would you tell us of the conversations that you had with him?

A. Yes, when I hired him—— [236]

Q. When was that? That would be approximately three weeks prior to the time he failed to show up?

A. Yes, that would be approximately the 25th or 26th.

Q. Of April? A. Yes.

Q. What was that conversation?

A. I told him when I hired him that I would rather the job would stay non-union right now until we got all of our trucks moved down here and got the thing operating smoothly and got to pick out

(Testimony of M. A. Quisenberry.)

our drivers, and so forth, and he said, "All right, that is the way it will be," and that was the extent of the conversation.

Q. And when was the next conversation?

A. The day he left.

Q. And what was that? Where was it?

A. Well, we were discussing this union deal because I still didn't have all the trucks moved down here, I still had more trucks coming all the time, and the conversation was approximately the same as the first one. I said, "I want the guys to wait until we do get lined up and get started before we go into any negotiations with the union.

Q. What was his reply?

A. He said, "Well, I am a union man, Slim," and I said, "I don't blame you a bit, I am too."

Q. You have belonged to the Teamsters Union yourself? A. Yes, sir. [237]

Q. And then he never returned?

A. No, he never came back to work.

Q. Was there any conversation with these men and I will ask you to state specifically and not generally with reference to these men that were discharged, about their qualifications as to whether or not if they didn't prove out right that they would be discharged?

A. That is right, I mean everybody knows that when we are hired for a job, for approximately 30 to 40 days, they are on a probationary period; that is a standard rule.

Mr. Schoolfield: I will object, Mr. Examiner.

(Testimony of M. A. Quisenberry.)

Trial Examiner Doyle: Yes, I will sustain the objection. I will strike the answer as not being responsive. The question was, "What instructions were given to these men?", not what you think they may have understood or what you may have understood. Did you tell the men they were on a probationary period?

The Witness: Yes, I told them.

Q. (By Mr. Langmade): Now, with reference to Cox, Johnson, Richins, Almada or Bailey, do you remember any specific conversations with them?

A. Yes, I tell every employee that I hire that there is a 30-day probationary period, 30 to 40 days probationary period whereby I will find out whether he is going to get along with me and whether I am going to get along with him and whether he treats the trucks right or not. I tell all employees that. [238]

Q. Now, Mr. Quisenberry, with respect to E. W. Richins, are you acquainted with him?

A. Yes, sir.

Q. And I believe that he testified that it was April of 1953 that you employed him; is that correct?

A. Yes.

Q. And at the time you employed him, did you have a conversation with him?

A. Yes.

Q. And did you question him about his union affiliations?

A. I asked him whether or not he belonged to the union, yes.

Q. What was his reply?

(Testimony of M. A. Quisenberry.)

A. He said, "I have a withdrawal card."

Q. Did you have any conversation with him at that time that you were paying union scale in order to keep it non-union?

A. No, I said this: "The union contract negotiated with McNutt Oil Company from El Paso to points in Arizona gets five and a half cents a mile, or five and seven-eighths cents a mile and we are paying six cents a mile." That is what I said.

Q. Then he testified to another conversation that you had with him about he was going to vote, and that his testimony was more or less to the effect that you told him that——

Mr. Schoolfield: Mr. Examiner, this is not proper direct examination.

Trial Examiner Doyle: Well, I don't see how there is any [239] way other than this counsel can handle it. There are a great many charges here of 8 (a) (1) and I think the only thing he can do is direct attention to specific testimony and ask him his version of the conversations. What do you object to?

Mr. Schoolfield: I object to the fact that counsel is not asking what was said in refreshing the witness' memory, but in stating in effect what former witnesses said and asking him was that said or not.

Mr. Langmade: The only thing, Mr. Examiner, they themselves weren't able to fix the time and place of these conversations, so to place his memory with that conversation is the only way I know how to do it.

(Testimony of M. A. Quisenberry.)

Trial Examiner Doyle: That is about the only way that I can see that the matter can be handled. I will overrule the objection.

Q. (By Mr. Langmade): Do you remember Mr. Richins testifying yesterday about a conversation you had relative to voting? A. Yes.

Q. What was said at that conversation?

A. Well, I did say something about it because we were going to have an election, although no union official had ever contacted me and asked me for negotiations or asked me anything to this day.

Q. Go ahead.

A. But I did say to them, "Off the record," I said, "This is [240] off the record, and I really shouldn't ask you, but how would you vote if we had an election?" And I did say, "It doesn't matter either way," and I didn't tell anybody that they were going to vote themselves out of a job.

Trial Examiner Doyle: You said you did tell them that?

The Witness: I didn't tell them they would vote themselves out of a job. I didn't tell anybody that.

Q. (By Mr. Langmade): Have you ever been contacted by any member of the union?

A. No, sir. I retract that statement. Mr. Stratten called me one morning when I was still living here in Tucson and talked to me by telephone, but I can't remember the exact conversation. I told him I was willing to enter into negotiation with you present, with my attorney present, at any time that you were willing, and I still say that.

(Testimony of M. A. Quisenberry.)

Q. Now, with reference to the discharge of Mr. Richins, would you relate the conversations and times and places and what happened?

A. This No. 11 truck——

Q. Is that the truck that Mr. Richins was driving?

A. That is the truck that Mr. Richins was driving. When we brought it down here, it did have a transmission in it that had a rattling fifth gear; it rattled. In other words, every time you used the fifth gear, it rattled, it didn't jump out of gear or anything, but it just made a noise. So we put a new fifth [241] gear in it, just the fifth gear, and Mr. Richins drove it approximately three times, or four after that new transmission was put in, and the transmission fell out of it. In other words, it just came to pieces. Now, I looked at that transmission when they had it apart the first time and the gears were all in good shape. When Mr. Doolittle brought the truck back after it was patched up out there on the road so we could get it to Phoenix, every gear in it, starting from the first gear on, with the exception of the reverse gear, the teeth were rounded off the edges of the gears to show that somebody was pushing that thing in gear. And it couldn't have happened any other time because I looked inside the transmission just before that. So then we put another transmission in.

Q. All right. Then it was patched up in order to be taken on to Phoenix for a new transmission to be put in it; is that correct?

(Testimony of M. A. Quisenberry.)

A. A new transmission was put in it, yes, sir.

Q. And Mr. Richins was still on the job?

A. Yes, sir.

Q. All right. Then what happened?

A. Richins went back on the truck and about three trips later the fifth gear started rattling again and jumping out of fifth gear, you couldn't keep it in fifth gear. So I laid Mr. Richins off, fired him.

Q. And did you examine the gears yourself personally the second [242] time they were taken out?

A. Yes, sir, I drove to Phoenix to look at them.

Q. What condition were they in?

A. They were in the same shape that the other gears were in. The corners were rounded where somebody had been cramming that thing in gear.

Q. Now, this last transmission, was it a brand new transmission or was it one that had been used, or a repaired one of the same transmission?

A. It was an old case, the outside box was an old case but every bearing and every gear in it was new. It was a new transmission.

Q. And would you fire anyone that did that to a transmission?

A. Mr. Langmade, I would fire my own brother if he did a transmission that way, I don't care who it was.

Q. Now, when you say you fired him, what was the conversation and how——

A. We were at the Dixie Truck Stop, but I tried to get a-hold of Mr. Richins, and as he stated

(Testimony of M. A. Quisenberry.)

in his testimony, he didn't have a phone and I called his sister-in-law.

Q. This was on or about May 25th that he was discharged?

A. That is right. I am not sure, it was either his sister-in-law or his sister, some relation of his whom we used to call to get hold of him, and I couldn't get anybody to answer the phone there so I already had another driver hired to take this [243] truck and I just waited at the truck stop until Richins came down.

Q. What was your conversation?

A. I said, "Bill, I am firing you because of that transmission." And he said, "Well, I take it I am fired for union activities," and walked off. That is all the conversation I had with him.

Q. Who was the man that you hired to replace him? A. McDonald.

Q. Is he still with the company?

A. No, sir. [244]

* * * * *

Q. Now, relative to John Cox, you heard the testimony here yesterday? A. Yes.

Q. And Mr. Cox was discharged; is that correct?

A. That is right.

Q. And for what reason did you discharge him?

A. For speeding.

Q. Will you relate the circumstances up to that—leading up to that?

A. Yes, now, relative to this, there was times when the refinery wasn't staying open 24 hours a

(Testimony of M. A. Quisenberry.)

day. Now, the refinery is open at this time 24 hours a day, so, consequently, we can load any time we get there. At this time the refinery closed at 8:00 o'clock in the evening. Sometimes the trucks would be running so late that I just would be right on the line getting into the refinery. And I did tell, on occasions, Bill Turner and John Cox and Harry Almada and, I believe, Bill Johnson one [245] time, and Bob Dayton, I did tell some of those boys who I thought were my better drivers that could handle the trucks, to take the chart out and make the refinery. But I said, "Do it safely," but that didn't mean that I wanted it done all the time when I was running on time. When I was running on time I expected the trucks to be treated as such, 55 miles an hour. That is like saying the speed law is 50 miles an hour, but that doesn't mean across a plowed field, that means on a good highway. But John had driven three or four times at a sustained speed of 60, 65, all the time. Some of the boys would get up to 60 once in awhile passing somebody, I wouldn't say anything about that, because if they get out on the left side of the road, they have got to go on by.

Q. Now, did you have any conversation with him relative to his speeding prior to the time you discharged him?

A. I believe on about the 12th, we were discussing the speed.

Q. The 12th of which month?

A. Of May.

Q. All right, go ahead.

(Testimony of M. A. Quisenberry.)

A. We were discussing speed.

Q. Do you recall the conversation?

A. No, not exactly. I said that I didn't want the trucks driven over 55 unless I get specific orders for that truck to be driven that way.

Q. And what was his reply? [246]

A. He said he didn't.

Q. Then that was the last conversation you had with him up until the 15th of May when he was discharged?

A. When I discharged him, yes.

Q. What was that conversation, where did it take place?

A. In my house. Relative to that, my office is in the house. That is the only place we have for an office right now until we get a terminal built. That is the only place we had for an office here. That is where the books were kept. So, consequently, most of the conversations I have with most of the drivers are right at my house. I called him in and I showed him this chart and I said, "Johnny, we can't go for this kind of stuff. We will have to let you go."

Q. Was there any conversation at that time about being discharged because he belonged to the union or didn't belong to the union?

A. No, the only conversation I had with him relating to the union—yes, it was mentioned then, too. I asked him if he was a paid-up member in good standing in the union. I did ask him that.

Q. You don't know what his reply was?

(Testimony of M. A. Quisenberry.)

A. He said, "Yes, I am."

Q. Then what was the other conversation?

A. When I first hired him?

Q. And that was the time you stated that you were asking those [247] questions?

A. Yes, I admit that I asked everybody those questions when I first hired them. Some of the boys I didn't, some of them asked me before I ever hired them.

Q. Now, relative to Kenneth VanHorn, I believe the testimony was that he was employed around the 1st of May and the employment terminated sometime around the 12th or 13th of May?

A. Uh-huh.

Q. Did you discharge Mr. VanHorn?

A. I did.

Q. And for what reason?

A. Because he couldn't get over to the truck stop when the truck was in. I always had to go wake him up and sometimes the trucks would be coming in at 3:00 in the morning and I was staying up pretty late and I couldn't leave there. I had to sleep sometime.

Q. Well, on this particular day that he was discharged, which I believe was May 12, according to my penciled notation, there was some confusion in the testimony about when he took out the run or when he didn't. Do you remember, can you recall the exact conversation, what happened on that day?

A. He was supposed to take an early truck out that day and he didn't make it over. I say an early

(Testimony of M. A. Quisenberry.)

truck, I mean around 4:00 a.m., as best as I can remember. And he didn't show up. So I was out to the truck stop a little while after that and I [248] called another driver for that truck and sent it on. And later that afternoon about 1:00 or 2:00 o'clock, another truck came in and the driver that I sent out that morning had just gotten back, so I sent VanHorn on that trip. And this was the second or third time that he had missed trips from being late.

Q. And then what was the conversation when you discharged him?

A. I just told him I was firing him because he couldn't get to work on time. And he sat in the booth and said, "I assume you are firing me because of the union activities?" And I said, "No, sir, Kenneth, I am not," and I didn't.

Q. Then later on, you had rehired Mr. VanHorn?

A. Yes, he called me right around the 1st of September, I think, and wanted to talk to me and I was in Phoenix and we couldn't get together, he would call the office and I would be down some place. And often he would call me from the Fruehauf Trailer Company and I would be back in the office and finally he came to Phoenix and I talked to him at the Texas Independent home office.

Q. And what was that conversation?

A. I told him that I would have a job for him, and I said, "In Tucson," and he said, "Slim, I would rather work in El Paso." I said, "That is fine, I will see if I can't work you in down there,

(Testimony of M. A. Quisenberry.)

because we still have other trucks coming on to the job and I am still hiring drivers all the time." I said, "I will see if I can't work you in down there." So I had one run in El [249] Paso and I told him he could come down, and I paid him.

Q. Then when he got here, the run wasn't available?

A. Yes, he pulled a run here before he came to El Paso. Then I paid him for driving his car to El Paso and he made one run from El Paso and I told him I would have to have him in Tucson because of one truck breaking down. That gave me a surplus of drivers down there. I paid him for coming back again and furnished his gas. I haven't paid him yet, but it will be on his check when he gets it pay day.

Trial Examiner Doyle: As I understand it, he is now working for you?

The Witness: Yes, sir, he is.

Trial Examiner Doyle: That is back in Tucson?

The Witness: He is here in Tucson.

Trial Examiner Doyle: I just wanted to be sure to have these men straight in my mind.

Q. (By Mr. Langmade): To refresh your memory, there was testimony that he had a conversation with someone in Phoenix, and then when he came back here, there was some conversation with you, do you remember that, where he delivered gasoline to Blakely No. 1 in Phoenix?

A. Yes, I remember that conversation. I said,

(Testimony of M. A. Quisenberry.)

"This fellow you were talking to over there, or was talking to you, whichever way it was, is one of the plant employees," and I said, "I would just as soon you wouldn't talk to those boys about any of this [250] stuff." I did say that, but that isn't the reason I fired him.

Q. Now, relative to Sidney Bailey, I believe the testimony was that he was employed the early part of May and discharged on or about the 6th of July, 1953; is that correct?

A. That is about right, yes, sir.

Q. To your knowledge, was there any conversation with him as to whether or not he belonged to the union?

A. I believe there was, yes.

Q. Do you know what that was?

A. Yes, I asked him to put his union affiliation on his application blank.

Q. Anything else?

A. And I told him I would rather that the job would not go union until we got smoothed out. At this time we were sort of confused. We were moving trucks in and hiring drivers and eliminating drivers and running up and down the road here trying to get the thing going, and until we got rolling smoothly, I would rather not. I did say that.

Q. And then you discharged him on or about the 7th of July, 1953?

A. On or about that date, yes.

Q. What was the reason for that?

A. Well, the truck had been sick. When this particular truck was brought down here it had a

(Testimony of M. A. Quisenberry.)

brand new motor in it, No. 15, and it ran very good up until this time and it began being sick. I [251] mean it wouldn't pull, part of the time it would be missing and break an injector line, and we were just having trouble with it. And we had it in Phoenix, oh, twice, and then sent it back and it sounded the same. So I called the mechanic in Phoenix and I told him, "I am going to send the El Paso driver up there with this truck and if you can't fix it, say so, and I will send it somewhere it can be fixed." So it was fixed that trip and immediately the truck became sick again and it was necessary for me—well, the mechanic phoned me the next morning and said, "Slim——"

Mr. Schoolfield: I object to that, Mr. Examiner.

Trial Examiner Doyle: Sustained, that would be hearsay.

Q. (By Mr. Langmade): Do you know of your own knowledge what was wrong with the truck?

A. Yes.

Q. What was wrong?

A. Mr. Bailey would go down the road at 50 miles an hour with his foot on the throttle uphill and would pull that compression release under the assumption that he was cleaning the soot out of it. He told several drivers that that was the way you cleaned the motor out.

Mr. Schoolfield: I object to that and ask that it be stricken from the record as hearsay.

Trial Examiner Doyle: Strike it out.

Q. (By Mr. Langmade): I will rephrase my

(Testimony of M. A. Quisenberry.)

question. Do you know what was wrong with the piece of equipment and why it was [252] sick?

A. Yes.

Q. To your own knowledge?

A. My own knowledge.

Q. What was wrong?

A. He was pulling this compression release.

Q. Now, would you explain to the Examiner what pulling the compression release means?

A. Yes, a compression release on a diesel truck is used for starting or stopping the motor. If you are sitting still, you always let the motor come to an idle before you pull that compression release. You pull that compression release and consequently it doesn't fire and the motor dies. So it is the same way when you start the motor, you pull the compression release and push the starter button and as soon as the motor gets turning free, you push the compression release in and it stops. That is the only reason for that compression release, to start and stop that motor, like turning a switch off and on on your automobile.

Q. Now, did you have any occasion yourself to see Mr. Bailey pull the compression release?

A. Yes.

Q. When and where was that?

A. It was going up Texas Canyon just out of Benson going towards Willcox. It was night.

Q. What were the circumstances? [253]

A. I was driving behind him in my car.

Q. Do you often do that with various drivers?

(Testimony of M. A. Quisenberry.)

A. I do that with all the drivers. Lots of times I am behind them in the car, but in this particular instance, I was wanting to see for myself whether or not this was happening, and I saw it happen.

Q. And relate the circumstances of what happened.

A. Well, he was going up—well, there was a long grade as you go just out of Benson, you go up a steep pitch and then it is sort of a long grade up to the top of Texas Canyon there and I would imagine from the speed he was making that he must have been in about fourth direct. And he was working at about, oh, maybe a three-quarter throttle. It may have been a full throttle but I don't imagine he was working at it full throttle. But suddenly, a ball of black smoke came out of that thing and you could hear that motor go k-l-u-t-t k-l-u-t-t. The compression release had been pulled, and I let him go on to El Paso and I turned around and came back to Tucson and I called him the next day and told him.

Q. What was your conversation with him then?

A. I just told him that he had been pulling the compression release on that thing and he was fired. He said he didn't do it, and I said, "Bailey, I saw you do it."

Q. I will ask you, Mr. Quisenberry, whether or not you have discharged any men since the beginning of this operation other [254] than that period here at this hearing—that period concerning this hearing?

(Testimony of M. A. Quisenberry.)

A. Yes, one. His name was Bob Heatherly and I fired him for wrecking a truck and burning it up.

Q. Were any other employees whose charges were filed here——

A. No, I think everybody I have fired is right here or was here.

Mr. Langmade: I believe that is all.

Trial Examiner Doyle: May I just suggest that you might have some testimony on this line.

Now, how many men were there employed as truck drivers here during this period? Now, we have had the testimony of a number who were laid off and discharged. Were there any of these employees who were hired at about that time and whose employment was not interrupted in any such way as those here?

Mr. Langmade: I will ask that, Mr. Examiner.

Q. (By Mr. Langmade): How many employees do you have at the present time?

A. Twenty-six on the payroll; that is the over-the-road operation.

Q. And approximately how many did you have in the beginning when you first started this operation?

A. Well, I hired two truck drivers to start with because I was only there with one truck.

Q. And the operation has increased until it is now 26? [255]

A. We are getting bigger all the time, yes.

Q. And would you explain if the operation has been continuous or whether certain drivers had

(Testimony of M. A. Quisenberry.)

been laid off other than these that had been discharged?

A. Well, now all the drivers on the trucks, these boys all know that they are driving for me, if their truck happens to break down, they do have to lay off until I can get that truck fixed. If I have it in El Paso, I generally get it fixed quicker than if I have it in Phoenix, that is because I am there to kind of keep pushing things along. All the drivers know they have to lay off if their truck is broken down. If the boys are broken down, the guys among themselves, they split up the rounds and say, "You can have a run for me today; you are not working, and you can go out in my place." They do that of their own free will, I don't have anything to do with that. If they want to trade a run, that is fine, to keep somebody else from laying off.

Q. Can you tell me approximately how many men quit the job of their own volition?

A. Uh-huh.

Q. Can you tell me how many men approximately quit their job of their own volition since the inception of this operation?

A. About nine men have quit. [256]

* * * * *

Examination

Q. (By Trial Examiner Doyle): Now, I am going to ask you about the operations at around about May 12 to 15, at or about the time that Cox and Johnson were terminated. Now, about that time, as far as your driving force was concerned,

(Testimony of M. A. Quisenberry.)

how many men did you have total in your driving force, approximately?

A. I believe I had four trucks here then. Now, I am not positive about this, so if I had four trucks here, I would have eight or nine drivers.

Q. All right. I will make it four trucks. Tucson, nine drivers.

A. They weren't all in Tucson. Part of them was in Lordsburg because we was splitting this in Lordsburg.

Q. You had four trucks, Tucson; was that considered the headquarters for the four trucks?

A. That was considered the headquarters, yes, sir.

Q. Then you have two men in Tucson and two men in Lordsburg; is that the way it is?

A. One man in Tucson and one man in Lordsburg.

Q. All right. Now, where were the headquarters for the others? There was more than one man at Tucson, wasn't there?

A. One man for each truck.

Q. One man for each truck?

A. Yes, sir, and a man for each truck in Lordsburg.

Q. All right, four at Lordsburg and four at Tucson? [257]

A. Yes, sir.

Q. All right. Now, what other force did you have?

A. At that time I didn't have any.

Q. That was the total?

(Testimony of M. A. Quisenberry.)

A. That was the extent.

Q. That was the extent of your operations?

A. Yes, at that time. We were moving trucks down all the time.

Q. Now, from the men that you had at that time, the eight men there, am I to understand that you had an altercation of some sort with practically every one of those men? A. No.

Q. All right. Who was it that was working at that time and who is still working that wasn't involved in this?

A. George Wallsmith and Herschel Beeson was both working at that time.

Q. Wallsmith and Beeson?

A. Stewart Seymour was working at that time, and Grossheim, Joe Delgado, Al Jenson, and I am not sure, but I believe Howard Saner was working at that time. I think that is about all. [258]

* * * * *

Mr. Schoolfield: I solicit a stipulation at this time that the application for employment heretofore referred to as General Counsel's Exhibit 2, marked for identification, the bottom line or blank on that application reads as follows:

"Activities other than religious (civic, athletic, fraternal, and so forth)" and a long blank to be filled in under that in small print excluded the organization, the name or character of which indicates the race, creed, color or national origin of its members. That completes the blank or line referred to in this case.

(Testimony of M. A. Quisenberry.)

Mr. Langmade: What exhibit is that?

Mr. Schoolfield: It is Exhibit GC-2, marked for identification.

Trial Examiner Doyle: You propose a stipulation in lieu of putting in evidence the entire application?

Mr. Schoolfield: That is correct, Mr. Examiner.

Mr. Langmade: And I will so stipulate that that is what the application states.

Trial Examiner Doyle: And as I understand it, that is the line of the application blank to which testimony has been [259] referred, stating that some of the applicants filled that in with the name of the union in that blank. All right, thank you, gentlemen.

Cross Examination

Q. (By Mr. Schoolfield): Mr. Quisenberry, when did you first see the tire that was burned by Harry Almada?

A. The morning that it happened, right after it happened. I said right after it happened, it was six hours maybe before I was there.

Q. How did you happen to see that tire?

A. I knew where it was.

Q. How did you know about it?

A. Somebody called me and told me about it.

Q. One of your other drivers?

A. Somebody called me and told me about it.

Q. And you went to the spot on the road where it lay?

A. I sure did.

(Testimony of M. A. Quisenberry.)

Q. Now, how did you know that wasn't a different tire?

A. Because the person who called me and told me about it told me which wheel it came off of. He told me it came off the trailer.

Q. Now, you stated before that in your opinion the tire had been at least 30 miles or 35 miles to burn that badly; is that correct, sir?

A. It would possibly take more than that. [260]

Q. You think it would take more than that?

A. It possibly would, I say.

Q. Go on.

A. If he was loaded, it could burn in 35 miles like that, easy.

Q. And you formerly stated also that the position of the tire was approximately 80 miles from Lordsburg; is that correct?

A. Yes, uh-huh.

Q. And the truck itself was empty; is that correct?

A. Yes, the truck and trailer were empty.

Q. Mr. Quisenberry, would you tell us whether a man driving an empty truck would be more likely to suspect a blown-out tire than a man driving a loaded truck?

A. If a tire blows out, you will know it.

Q. Did this tire appear to be—to have blown?

A. You couldn't tell, it was burned up so badly you couldn't tell. If it had blown, he would have known it.

(Testimony of M. A. Quisenberry.)

Q. Then it is your opinion that the tire did not blow?

A. It is my opinion that the tire did not blow out.

Q. Now, on Mr. Almada's procedure, after he found out the tire was burning, was there anything to be criticized about his actions at that time?

A. After he had found he had burned the tire?

Q. Yes.

A. No, I can't say as he did anything to be criticized. It [261] was the act of burning the tire. In all of our operations, sir, we have never burned a tire like that.

Q. Now, Mr. Quisenberry, laying the tire on the side of the road was a careful and sensible thing to do, was it not? A. I agree.

Q. To put a tire that might catch aflame back under the rack of a gasoline truck would be extremely dangerous, would it not? A. I agree.

Q. Now, Mr. Quisenberry, did you ever give your drivers printed instructions on the length of the number of miles between truck bumps?

A. No.

Q. Did you ever give your drivers any type of instructions other than verbal on that?

A. Verbal instructions, yes.

Q. Is that all you ever gave to them?

A. Well, after that, I did have some printed forms made up.

Q. And then you handed them around to your drivers? A. Yes, sir.

(Testimony of M. A. Quisenberry.)

Q. What mileage did you put on those printed forms?

A. Sixty to seventy, I believe, as well as I remember.

Q. You didn't put 80? A. No, sir.

Q. You, of course, naturally wouldn't put 80—is this a correct statement: Did you, when you put this circular out that [262] you are talking about, these printed instructions, make the number less than 80 miles because of the Almada incident?

A. No, sir, I always had it 60 miles, tire bumps.

Q. Mr. Quisenberry, I will hand you a paper that I have marked——

Mr. Schoolfield: I will ask the reporter to mark it as General Counsel's No. 3——

Q. (By Mr. Schoolfield): ——and see if you recognize this. Is that your signature at the bottom? A. It sure is.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 3, for identification.)

Q. (By Mr. Schoolfield): And is that the paper I read from a second ago? A. Yes.

Q. Would you read No. 8?

A. "Drivers will bump tires at least every 80 miles and check transmission and hubs for heat."

Q. Then you identify this paper as the one you gave your drivers? A. I do.

Mr. Schoolfield: If the Examiner please, the attorney for the General Counsel requests that the

(Testimony of M. A. Quisenberry.)
exhibit marked GC-3 for identification be offered in evidence at this time. [263]

Mr. Langmade: No objection.

Trial Examiner Doyle: There being no objection, the document is received in evidence and shall be marked General Counsel's Exhibit No. 3 in evidence.

(The document heretofore marked General Counsel's Exhibit No. 3, for identification, was received in evidence.)

Q. (By Mr. Schoolfield): Now, Mr. Quisenberry, what kind of a driver, in your opinion, was Harry Almada? A. He is a good driver.

Q. A careful and good driver?

A. His accident record doesn't show that he is such a careful driver but he is a good driver.

Q. What is his accident record?

A. Oh, the accident record he had with a company before I hired him, he had two accidents with that company. That is the reason he was out of a job when I hired him.

Q. Was that a major accident?

A. I wouldn't know, sir.

Q. Just all you saw on it was "accident"?

A. That is all I know.

Q. How do you know he was out of a job because of the accident?

A. The fellow over at the time at the Southwestern Freight Lines told me.

Q. But you had Mr. Almada test hopped? [264]

A. I rode with him.

(Testimony of M. A. Quisenberry.)

Q. You rode with him yourself?

A. Yes, sir.

Q. And he checked out all right?

A. Yes, sir.

Q. Now, Mr. Quisenberry, when did Mr. William Johnson show up late for work?

A. I don't remember the dates. I can't tell you the dates. I mean all this stuff has happened and I don't keep down the dates, or anything. I couldn't say what day it was.

Q. Did he show up late for work before he terminated his employment?

A. He terminated himself.

Q. Did he show up late before that time?

A. Yes.

Q. How late was it, do you recall?

A. Oh, two hours, I think.

Q. And it is your statement now that you did not discharge him because of that?

A. He just left and didn't come back; I had to replace him.

Q. I understand that, but you also stated he showed up late before for work and didn't come back? A. That is correct.

Q. Can you remember how many days before he showed up late for work it was before he terminated his employment? [265] A. I can't.

Q. Would it be the day before?

A. Possibly.

Q. Now, Mr. Quisenberry, how many men of

(Testimony of M. A. Quisenberry.)

yours, how many men will drive your truck on a run of 24 hours?

A. We don't have any men running runs of 24 hours.

Q. You have shifts, do you not? A. Yes.

Q. And if you send a truck out, there might be two men driving before it has completed its run back to its original starting point?

A. It will be two.

Q. At least two? A. Yes.

Q. Sometimes three? A. No.

Q. Just two?

A. Uh-huh. Now, at this time you are speaking of, three men could have driven it, yes.

Q. The time of the termination of William Johnson, you mean, sometime around the 15th of May?

A. Uh-huh.

Q. And that would be also around the time when you discharged Mr. Richins, would it not?

A. I don't know, I think so. I am not sure of the dates. [266]

Q. Now, you have stated you discharged Mr. Richins for manhandling gears, is that correct?

A. That is correct.

Q. How about the other drivers on that same truck, how did you know they didn't manhandle the gears?

A. Because I rode with them and I never did ride with him; Harry rode with him.

Q. When did you ride with the other drivers?

A. During the process of hiring them and, oh,

(Testimony of M. A. Quisenberry.)

sometimes I would get in and ride up the road
aways with them and have somebody bring my car
and then I would get my car and come back. I
have done it several times.

Q. Mr. William Turner testified, I think, that
he test hopped Mr. Richins; is that not correct?

A. I am not sure; he or Harry one gave Richins
a student trip.

Q. You don't recall who did?

A. No, I think they both did.

Q. I think that was his testimony.

A. They both did.

Q. They had two check-outs? A. Yes.

Q. Now, did you talk to Mr. Turner about Mr.
Richins' driving? A. Yes.

Q. Did you get a satisfactory answer—I suppose
you did, you [267] hired him.

A. What Turner told me, he said, "Bill is not
used to this heavy equipment, Slim, but he will
make you a good man. He will learn as he goes
along."

Q. Now, what did Mr. Almada tell you?

A. Approximately the same thing, that Bill
would make a good man, that Bill was a careful
driver.

Q. Now, Mr. Quisenberry, is it not true that the
transmission in the truck Mr. Richins drove was
too small for its load? A. No, sir.

Q. Is it your testimony that the transmission
was large enough for the equipment?

A. Yes, sir.

(Testimony of M. A. Quisenberry.)

Q. Was it as strong as any other transmission in any other truck?

A. I wouldn't say that it is as strong as the transmission in a KW truck, no.

Q. Is it the same size transmission, or was the same size transmission then as it is now? Is the transmission in that truck now the same size as it was when Mr. Richins drove it?

A. No.

Q. A larger transmission?

A. No.

Q. Stronger transmission?

A. Bigger gears. [268]

Q. Bigger gears?

A. A lower-geared transmission.

Q. A lower-geared transmission?

A. Yes. At that time the gear ratio in that truck, it would run at top speed, I believe, in fifth drive, I think the top speed was about 72 miles an hour. Am I right on that? And now the top speed on the truck is around 64. I mean that is the difference in the gear ratio that we have put in now. But the transmission is the same size still.

Q. Now, I think you have testified that after you discharged Mr. Richins, you had to work on that transmission again; is that correct?

A. That is the reason I discharged him, because of the second time the transmission was jumping out of fifth gear, we couldn't hold it in fifth, the same gear.

Q. Now, the first time the transmission was repaired, you also testified that you put only one new gear in; is that correct?

A. No, sir.

(Testimony of M. A. Quisenberry.)

Q. What did you say then on that?

A. We patched it up in Lordsburg. The mechanic went out and just patched it up enough for us to get it into Phoenix and the mechanic brought it in himself.

Q. What was that patch-up job?

A. I don't know. I didn't go out there. Eddy Doolittle, the mechanic from Phoenix, took care of it. And I saw him in Tucson [269] when I got to Tucson. He drove the truck in himself, and he took the truck on into Phoenix and he dumped the load of gas and he rebuilt the box.

Q. Then it is your testimony that the box was completely rebuilt?

A. Yes.

Q. And every part was brand new?

A. Yes, sir, everything but the case.

Q. Now, Mr. Richins testified that he was able to stop the truck in enough time to keep from damaging the case; is that correct?

A. I presume so, if he kicked the Brownie box out of gear, and as long as the Brownie box is out of gear, there is nothing that can be concerned in the main box.

Q. Then as far as you know, the transmission broke down not during a gear shift; is that correct?

A. I wouldn't know.

Q. You don't know that?

A. I don't know that; I wasn't there.

Q. Did you not testify that before Mr. Richins was put on that truck, that those gears had been fixed?

A. That is right.

(Testimony of M. A. Quisenberry.)

Q. Did you say that it was jumping out of fifth gear when he went on it?

A. No, sir, I didn't say that. [270]

Q. What did you say about that?

A. When we brought that truck down here, it had a good transmission in it.

Q. How do you know that?

A. Because I drove it down here myself.

Q. And the transmission was all right?

A. Yes.

Q. And it was not jumping out of fifth gear?

A. No, sir.

Q. When did it start jumping out of fifth gear?

A. I couldn't say the date, I couldn't say the date but it was approximately three or four trips after we got it down here.

Q. And who was driving for those three or four trips?

A. Richins was driving from Lordsburg.

Q. And after he had had his first transmission failure, you put him back on the same truck, did you?

A. I sure did.

Q. Do you recall who else drove that truck the second time?

A. Uh-huh, Alton Everett drove it on this end. and I believe Bill Johnson drove it. I believe, I wouldn't say for sure, but I believe Bill Johnson did drive it.

Q. And did you discuss with Alton Everett or Bill Johnson the shape of the gears or the repair of the truck?

A. I don't think so.

(Testimony of M. A. Quisenberry.)

Q. And the only reason then that you know that Mr. Richins [271] was the one that tore up the gears is because you had remembered that you had ridden with him before; is that your testimony?

A. No, no, not at all.

Q. How did you know it was Mr. Richins that tore the gears out of the truck, if they were torn out?

A. Because I rode with these other boys. They had had more experience. They were just better truck drivers than Bill Richins was.

Q. How old a truck was that, Mr. Quisenberry?

A. That is a 1951 Sterling. That truck is two years old this month.

Q. Can you estimate the number of miles on that truck?

A. A million and a quarter.

Q. A million and a quarter miles?

A. Yes, sir.

Q. That is a lot of miles.

Trial Examiner Doyle: May I interrupt here for a moment. Are these trucks sort of standard in your operation? Do you use Sterlings of this model?

The Witness: We had three of them, Mr. Examiner. We only have two left now. One of them burned up. We have had three of them and the rest of them are KW's with the exception of one Autocar, but they are all with tank and trailer.

Trial Examiner Doyle: The three Sterlings were all the same? [272]

The Witness: Yes, sir.

Trial Examiner Doyle: The transmission in all

(Testimony of M. A. Quisenberry.)

three of them were the same kind of transmissions, were they?

The Witness: With the exception of the other two, which had lower-speed gear ratios in them.

Trial Examiner Doyle: All right. Had you put the lower-speed ratio gears in those other two cars because you had had a similar experience with transmission as this car?

The Witness: No, sir.

Trial Examiner Doyle: Who made this modification in the transmission, your company?

The Witness: The equipment came to us that way.

Trial Examiner Doyle: It came to you that way?

The Witness: It came from the factory that way, yes, sir.

Q. (By Mr. Schoolfield): What is the advantage of the lower-speed gears, Mr. Quisenberry?

A. Well, the advantage of the lower-speed gears, especially in that fifth gear, you are pulling a motor hard in fifth gear, and anybody knows not to do it, but if you pull a motor hard in that fifth gear, you will finally knock that gear out of the main box every time.

Q. I see.

A. At a sustained—just holding it there, you know, just keep racking her back all the time, the fifth gear will go out.

Q. And that is why you put the lower speed gears in there? [273]

A. That is right.

Q. Does that have more pulling power?

(Testimony of M. A. Quisenberry.)

A. Not in fifth gear, it doesn't, no. You just don't pull one in fifth gear like that. The boys don't use their overdrive gears to pull steep hills in lower gears.

Q. I see. Then without the lower-speed gears, the fifth gear will go out on the other trucks?

A. The fifth gear will go out on any truck if you use a sustained pulling power on it all the time, a strain, in other words, a fifth gear will go out on any box, whether it be Sterling, KW, Auto-car, or whatever it is.

Q. Now, the KW's and the other type trucks you use, are they more powerful trucks than the Sterling? A. No, sir.

Q. Are the Sterlings more powerful?

A. They are both the same.

Q. Both the same?

A. They all have the same motor with the exception of one truck.

Q. Do they carry the same capacity of gasoline?

A. No, sir. No. 15 carries 8200; No. 3 carries 7700; No. 11 carries 7900; No. 1 carries 7950.

Q. There is not too much difference?

A. The gross weight of all of them when they are loaded is practically the same. [274]

Q. Now, when you discharged Mr. Richins—Strike that.

Had you formerly warned Mr. Richins about the gears in the truck before you discharged him?

A. No.

Q. In other words, you just went up and fired

(Testimony of M. A. Quisenberry.)

him and said it was just because of the transmission: is that correct?

A. That is exactly it.

Q. Now, on John Cox, Mr. Quisenberry, did you warn John Cox about speeding?

A. I had a talk with him around about the 12th, and the conversation was about speeding, and I said, "I don't want these trucks driven over 55 miles an hour unless I give specific orders to do so."

Q. Was it often that you would give these orders?

A. At that time it was fairly often, yes.

Q. Now, would you tell the driver to keep at 55 miles an hour if you didn't want him to hurry up on his trip?

A. That is right, stay within 55 each time.

Q. Would you tell him each time he went out?

A. No, sir. They knew that if I didn't give them orders not to do it, they knew not to do it. If I didn't come out and say, "I want you to make the refinery: open the clock and go on," then they knew to put the chart in there and run 55 miles an hour.

Q. Had you told each of those drivers individually that? [275]

A. I think so, yes.

Q. Are you sure?

A. No, sir.

Q. Is it possible that these drivers could have been confused on your orders for the speed?

A. Hardly.

Q. Who was the man that talked to VanHorn at Blakely No. 1: what was his name?

A. I don't know.

(Testimony of M. A. Quisenberry.)

Q. You don't know who it was?

A. No, sir.

Q. Did you know where this man worked?

A. Yes, sir.

Q. Where did he work?

A. Texas Independent Oil Company.

Q. That man worked for Texas Independent Oil Company? A. Yes.

Q. How did you know he worked for Texas Independent Oil Company?

A. Because I seen him around there.

Q. But you don't know his name?

A. No.

Q. Go on.

A. There are a lot of people working up there, guys driving tank trucks, and stuff around that plant, I don't know their [276] names; I don't know them at all. I have no business up there. It is very little business I carry on that way. Telephone conversations and mail is about the only contact I have up there.

Q. Is Blakely No. 1 at Texas Independent's office? A. No.

Q. Where is Blakely No. 1?

A. Nineteenth Avenue and Buckeye Road.

Q. Would you know what an employee of Texas Independent would be around there for?

A. Yes, sir.

Q. Why?

A. Oh, I might be fixing up a sign. I might be

(Testimony of M. A. Quisenberry.)

fixing up a pump or repairing a water cooler, or I might be doing anything.

Q. A Texas Independent oil man would be at Blakely No. 1 doing those things?

A. Yes, sir.

Q. For what reason? That is not owned by Texas Independent Oil Company, is it?

A. I don't know.

Q. Well, did Mr. VanHorn describe the man to you when he called you about it? A. No.

Q. How did you know that he talked to a man there? Did you know it before you talked to VanHorn? A. Did I know what? [277]

Q. Did you know that VanHorn carried on a conversation with an employe of the Texas Independent Oil Company at Blakely No. 1 before you talked to VanHorn and discharged him?

A. I was in Phoenix when Van Horn was dumping that load.

Q. Then you saw him talking to this man?

A. That is right.

Q. And you don't know the man's name?

A. No, sir.

Q. Now, Mr. Quisenberry, on Sidney Bailey, your testimony has been that the truck was sick; is that correct?

A. After he started driving it, yes.

Q. It was not sick before? A. No, sir.

Q. I think you said it was a brand new engine in that truck?

A. When we brought it down here, it was.

(Testimony of M. A. Quisenberry.)

Q. And Mr. Bailey went right on it?

A. No, sir.

Q. Who did start driving it?

A. When I brought No. 15 down, Bill Turner drove it first and Harry Almada and then as I got a bigger truck down here, I brought a 300 horse motor down here and I put Harry on the 300 horse and Al drove No. 15 for awhile, and Mr. Nutter drove No. 15 for awhile, but I don't think Nutter drove No. 15 —yes, I guess he did, too. He drove No. 15 before this happened.

Q. Now, you have testified that you followed Bailey? [278]

A. Uh-huh.

Q. In your car? A. Yes.

Q. About how far back of him were you?

A. Oh, a hundred fifty feet, two hundred, maybe; I don't know exactly, it was night.

Q. Can we say it was a reasonable distance for caution and care on the road?

A. Yes, I would say so.

Q. It wasn't your habit to get right jam up back of your drivers? A. Once in awhile.

Q. You would follow them even though they had air brakes on the trucks, you would get jam back of them?

A. Oh, not bumper-to-bumper. I would get the length of this room up to them.

Q. Why would you get so close, Mr. Quisenberry?

A. Because I wanted to hear them change gears going uphill. I would want to listen to the motor,

(Testimony of M. A. Quisenberry.)

want to watch their actions. I would want to watch and see how much clearance they gave when passing cars, and see how they rode the shoulder of the road and how they rode the white line—how they handled their truck.

Q. What kind of a driver was Bailey?

A. Very poor.

Q. A very poor driver? [279] A. Yes.

Q. Now, you have testified that you saw a black ball of smoke and heard a motor noise; is that correct? A. Yes.

Q. Now, had you also testified that that is the only means of effecting such a smoke cloud and noise, to pull that compression release?

A. That is right.

Q. Now, you also testified, did you not—did you call Bailey or did you see him in person when you discharged him?

A. I called him on the phone.

Q. And did you ask him if there was a reason for his pulling the compression release?

A. Yes, I asked him why he did it.

Q. What did he say?

A. He said, "I don't do that, Slim; I never do it."

Q. He said he hadn't? A. Yes.

Q. And then you discharged him?

A. I said, "I know you did, Bailey, I can't go for that."

Q. Was there any particular reason that you were following Bailey that night?

(Testimony of M. A. Quisenberry.)

A. Yes.

Q. Why was that?

A. I wanted to see if he was doing this himself. I wanted to [280] see if he was, because the mechanic in Phoenix had told me that he thought that was what was happening to the truck.

Q. And did you follow any of the other drivers on that truck? A. Yes.

Q. And did you see any compression release being pulled?

A. No, sir, not while the truck was in motion.

Q. Is there any reason a man would pull the compression release in the truck while traveling, for a safety reason? A. One reason.

Q. What was that?

A. If a fuel line would break on the back side of the pump between the pump and the fuel supply, if that fuel line would break or come open some way and the pump would take air, the motor consequently would take air and it would run away with itself.

Q. I see.

A. But when that happens, the truck is immediately brought to a screaming halt as quickly as they can get it stopped. They don't keep going on down the road after it has happened. They stop to see where the trouble is.

Q. How many wrecks have you had since you have been operating Texas Independent Oil?

A. I haven't had any.

Q. Your drivers, Mr. Quisenberry?

(Testimony of M. A. Quisenberry.)

A. Four. [281]

Q. Four? A. Uh-huh.

Q. Have you discharged any men over these wrecks? A. One.

Q. And only one; is that correct?

A. I believe so, yes, sir.

Q. The rest of the men are still driving for you?

A. Yes. No, one of them isn't; he quit.

Q. Would you tell us who has been involved in those wrecks, if you recall?

A. Merrill Nutter has had a wreck with No. 9. And Charles Estes had a wreck with No. 1. Stewart Seymour had a wreck with No. 7, and Bob Heatherly had a wreck with No. 9 and burned it.

Q. And Bob Heatherly was the man that was discharged? A. I discharged him.

Q. One more question, Mr. Quisenberry, I want to establish your testimony concerning Sidney Bailey's truck having a new engine. It did, is that correct?

A. It was a new motor when we brought it down here.

Q. And practically new when he went on; is that correct? A. Yes, it was.

Mr. Schoolfield: I will pass the witness.

Redirect Examination

Q. (By Mr. Langmade): Just a couple of questions, Mr. Quisenberry. And that is relative to the time that you came to Tucson [282] from El Paso, did you have any prior experience with Texas In-

(Testimony of M. A. Quisenberry.)

dependent Oil Company as to who their employees were? A. No.

Q. And approximately, since you have been in the employ of Texas Independent since the middle of March, how many times have you been in the office of Texas Independent Oil Company?

A. I have been in the office several times, but the office personnel is all I do know there. I don't know the guys out in the yard or the guys that are driving the tank wagons.

Q. There have been no occasions why you should know them? That is none of your business, is it?

A. That is none of my duties.

Q. And relative to Blakely Oil Company, could you explain for the record what type of business Blakely Oil is in?

A. The retail selling of gasoline and oil and tires and batteries and filling station supplies.

Q. Their operation is filling stations?

A. Multi-pipe unit filling stations.

Q. And what is the principal business of Texas Independent Oil Company? Do they have any retail outlets, or is it all wholesale?

A. All of it is wholesale.

Q. In other words, Texas Independent Oil Company is a distributor of gasoline in Arizona?

A. A distributor of petroleum products, yes.

Q. To your knowledge, do they themselves have a retail outlet?

A. To my knowledge, I don't know that they have any retail outlets.

(Testimony of M. A. Quisenberry.)

Mr. Langmade: I believe that is all.

Trial Examiner Doyle: I have a couple of questions, Mr. Quisenberry.

Examination

Q. (By Trial Examiner Doyle): Now, you say as you hired these men, you asked them whether they were members of the union or not and explained to them that you didn't want the union organized prior to the time that you yourself were organized, you were in operational form?

A. That is right.

Q. Now, then, did you have the occasion ever where you discussed your method of procedure in that regard with anybody of the Texas Oil Company's officers? A. No, sir.

Q. Now, Mr. Steele has been mentioned here several times. A. Yes.

Q. Was he your immediate superior?

A. He is my boss, yes.

Q. Now, did you talk it over with him?

A. I talked to him several times, yes.

Q. Did you talk to him with what you were doing in that regard? [284]

A. It wasn't mentioned until after I had been down here about six weeks, and then it was mentioned and Mr. Steele told me, "I don't know, but I think that you are breaking the National Labor Relations Act and we will have unfair labor charges filed against us for asking those questions. You

(Testimony of M. A. Quisenberry.)

had better talk to Steve." And I did and I immediately was told to cease and desist; quit it.

Q. All right. Did you talk to Mr. Steele or any other official of the company at any time in regard to forming a policy of the company to not hire union men or to keep the union off of the job?

A. We haven't conformed to a policy of not hiring union men or hiring union men. I will say right now that we have as many union men working for us as we do non-union, and I have not made any distinction that way. But now, as I have told you, when I started this deal, I did tell the boys that I would rather not organize until we got rolling.

Q. I know you are in charge of the over-the-road drivers and distribution; what is your title with the company? Do you have any specific title?

A. I guess I am the Terminal Manager for El Paso.

Q. Now, is it your testimony that without any instructions from anybody in the company, in position of higher authority than yourself, that you undertook to interrogate these men as to union affiliations and express your desires in the matter?

A. Yes, sir, for this reason: I always had to ask—I mean I worked for the Utah Construction Company and for several construction companies and for Alabama Freight Lines two or three times, and when I hired a man for those people, I had to ask that question. But most fellows know that those places are union jobs and they immediately

(Testimony of M. A. Quisenberry.)

say, "Well, I have to join the union, don't I?" Well, you have to ask a man that question and you have to tell him if he is not in the union, you have to tell him to go get in the union or we can't hire you. So on the basis of that, I asked these fellows the same question and I didn't know that I was breaking the National—in fact, I never had any dealings with the National Labor Relations Board before, or anything like that. [286]

* * * * *

H. B. SULLIVAN

a witness called by and on behalf of the respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Doyle: Will you please take the chair and give us your name and address?

The Witness: H. B. Sullivan, Post Office Box 341, Eclecto, Texas.

Trial Examiner Doyle: Mr. Sullivan, speak up, let us hear it.

Q. (By Mr. Langmade): When were you employed, Mr. Sullivan, by the Texas Independent Oil Company? A. August 21.

Q. And I will ask you whether or not you are a member of the Teamsters Union.

A. I have a withdrawal card.

Q. And at the time that you were employed, did Mr. Quisenberry employ you; did Mr. Quisenberry employ you? A. Yes, sir.

Q. At the time he employed you, did he know

(Testimony of H. B. Sullivan.)

that you were a member of the Teamsters Union and had a withdrawal card?

A. I don't know for sure.

Q. Did he ever know after that?

A. Yes, sir.

Q. Did he ever have any conversation with you relative to [287] your union membership?

A. No, sir, other than one time he asked me if I knew that this was a non-union job, and I said, "Yes, sir."

Mr. Langmade: I believe that is all.

Cross Examination

Q. (By Mr. Schoolfield): What did Mr. Quisenberry ask you about this being a non-union job, when was it?

A. I don't remember the date.

Q. But you were hired August 21st?

A. Yes, sir.

Q. Therefore, it was after August 21st; is that correct?

A. He didn't ask me that on August 21st.

Q. You just said that. What did he ask you?

A. He asked me if I knew it was a non-union job.

Q. What did you say to him?

A. I said, "Yes, I know it."

Q. Was this before or after August 21st?

A. After. We was just looking at a truck one day and talking.

Mr. Schoolfield: I pass the witness.

Trial Examiner Doyle: You are excused, Mr. Sullivan.

Mr. Langmade: I call Mr. Grossheim.

JOSEPH G. GROSSHEIM

a witness called by and on behalf of the respondent, being first duly sworn, was examined and testified as follows: [288]

Direct Examination

Trial Examiner Doyle: Give us your name and address.

The Witness: Joseph G. Grossheim, 7828 Highway 80 East, El Paso, Texas.

Q. (By Mr. Langmade): By whom are you employed, Mr. Grossheim?

A. Texas Independent Oil Company.

Q. And when were you employed by Texas Independent Oil Company?

A. I think April 19th or the 21st, sir.

Q. And by whom, by Mr.——

A. By Mr. West at the main office in Phoenix.

Q. And are you still employed by the Texas Independent Oil Company? A. I am.

Q. You heard the testimony here yesterday in particular of Mr. Bailey? A. I did.

Q. I will ask you whether or not you have ever had a conversation with him relative to pulling the compression release. A. I did, sir.

Mr. Schoolfield: I object, Mr. Examiner. This is going to be hearsay, I take it.

Trial Examiner Doyle: As I understand, this

(Testimony of Joseph G. Grossheim.)

is going to be a conversation between this man and Bailey.

Is that correct, Mr. Grossheim?

The Witness: That is quite correct.

Trial Examiner Doyle: Overruled. [289]

Q. (By Mr. Langmade): When was that?

A. This conversation took place around the end of May or the first of April; I mean the end of April or the first of May. Now, I am not quite clear on the precise date of it, I just come back from a Lordsburg run and at the time I was living in Phoenix and I wanted to see my wife and I deadheaded in my truck. We were north of Casa Grande when the conversation got around to the motors on the trucks and at the time how the discussion developed, I do not know, but we did discuss the pros and cons of pulling the compression release while you were traveling down the highway.

Q. What was that conversation?

A. Mr. Bailey said, "Well,—"—Anyway, words to this effect, that the pulling of the compression release blew the soot out, it cleaned out the motor, and I said, "Sid, it will also blow everything else out, let's don't do that." He said, "It is good for it." I said, "All you are doing is dumping out pure raw diesel when you pull that compression release and keep your foot on the pump." Sid said, "Why, no, you can see all the black smoke pouring out; that is really cleaning it out."

Now, your motor is hot enough that you have a certain amount of detonation there and so she is

(Testimony of Joseph G. Grossheim.)

bound to fire a little bit of the fuel enough to create the black smoke but you do dump out an awful lot of wet fuel. And I said, "Whatever you do, don't ever do it on No. 7," that was my truck at the time. [290] And that is about the extent of our conversation.

Q. You were hired along at the beginning of this operation, were you not; you were hired around April 19th, is that correct?

A. Yes, sir, but at the plant, the main office in Phoenix. I didn't come down here until the operation was fairly well under way.

Q. When was that?

A. I think I came down just about the middle of May.

Q. Did you ever have any instructions from Mr. Quisenberry as to the rate of speed?

A. Yes, sir, I was told it was 55 miles an hour.

Q. Did you ever have any occasion to violate that speed?

A. Yes, sir, I have, not through his instructions but in the beginning, I got bored at 55 miles an hour and I somehow managed to evade putting the chart in for awhile and every time he would see me, he would say, "Do you have a chart?" and I would quite aptly change the subject and say, "When are we going to get some tires for this thing," and I managed for quite awhile to evade that thing, and then he finally got me.

Q. Did Mr. Quisenberry ever say anything to

(Testimony of Joseph G. Grossheim.)

you about your union affiliateship, whether you were or not?

A. No, sir, I wasn't hired by Quisenberry. I was hired by Hank West and sent down here. The entire deal was done there through Hank West and Quisenberry, so when I brought the truck down, I went to work. That is all. [291]

Q. Were there ever any instructions given to you by Mr. Quisenberry relative to bumping tires?

A. Yes, sir.

Q. When was that?

A. Well, right when I first started working down there. He told me, I believe the first night I took a truck from Lordsburg, he warned me of two things that night, and one of them was—it was slightly raining and he warned me about the road around Seneca Wash, which is quite dangerous during the wet weather, and he said, "For God sakes, man, be sure to bump your tires on the way to Lordsburg." And I said, "How often do you want them bumped," and he said, "At least twice, at the very least, twice." And I didn't really have to be told, but he did tell me.

Q. How long have you been engaged in the transportation business in driving?

A. Since the war, about seven years. I did drive prior to that but it wasn't diesel.

Q. Is it the general practice to bump tires?

A. Yes, sir, a truck driver knows you have got to do that or you have had it.

Mr. Langmade: I believe that is all.

(Testimony of Joseph G. Grossheim.)

Cross Examination

Q. (By Mr. Schoolfield): Mr. Grossheim, you testified to a conversation between you and Mr. Bailey. Did he pull the compression release at that time? [292]

A. I have gone over this in my mind and I can't honestly say that he did.

Q. All you recall is this conversation?

A. That is quite true.

Q. Now, Mr. Grossheim, you have also testified that you have had at least seven years on diesels.

A. No, sir, I did not testify at least seven years' experience on diesel. I said I have had seven years' experience since the war and that a great portion of it was on diesel.

Q. Now, when you change gears in a diesel, Mr. Grossheim, does a great deal of smoke come out of the stack or not?

A. No, sir, not if the gears are properly changed, it does not.

Q. Suppose they are improperly changed.

A. Yes, a great deal of smoke can come out the stack.

Q. Could there also be a popping noise in the engine? A. No.

Q. Could there be any noise at all in conjunction with an improper gear change?

A. Only in the revving up of the motor.

Q. And that would be noisy?

A. Well, yes, but it wouldn't sound like a pop

(Testimony of Joseph G. Grossheim.)

or anything, it would just sound like any acceleration noise.

Q. Suppose the truck had bent push rods, would that make any difference? [293]

A. I can't say that it would. No, if the truck had power enough to pull the hill, I can't see that it would make that much difference.

Q. How about shifting gears on the hill, would there be any more smoke on the hill with the gears being improperly shifted? A. Yes.

Q. Diesel engines smoke a lot, don't they?

A. Yes, in fact, I believe they are called, as a colloquialism, "smokers".

Mr. Schoolfield: I pass the witness.

Mr. Langmade: That is all.

Trial Examiner Doyle: You are excused.

(Witness excused.)

Mr. Langmade: I call Mr. Beeson.

J. H. BEESON

a witness called by and on behalf of the respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Doyle: Give us your full name and address.

The Witness: J. H. Beeson, B-e-e-s-o-n, Benita Courts, Anthony, New Mexico.

Q. (By Mr. Langmade): Are you employed by the Texas Independent Oil Company, Mr. Beeson?

A. Yes, sir.

(Testimony of J. H. Beeson.)

Q. When were you employed? [294]

A. About April 20th, 1953.

Q. And are you still employed by them?

A. Yes, sir.

Q. And in what capacity? A. Driver.

Q. Do you drive one of these pieces of equipment that has been testified to here?

A. Yes, sir.

Q. You heard the testimony of Mr. Almada?

A. Yes, sir.

Q. And were you one of the drivers that came up after Mr. Almada had stopped?

A. I was.

Q. And would you explain what transpired there at that time?

A. Well, at the time I came up, there were two trucks, two of our trucks together. There was, I believe, a freight rig, a Western, I think, stopped already to help the man, and there was another one of our trucks with me, Joe Delgado, I believe. I stopped and went back to see if I could do anything. They had already pulled the tire off the trailer, the wheel off the trailer, and I helped them take the tire off of the wheel. Joe Delgado and I did that. I have a little hand extinguisher—the large extinguisher was sitting out on the ground, whether it had been used or was out of order, I don't know, I never asked—but I did take the little hand extinguisher, which is about 14 [295] inches long, out of Mr. Almada's cab and tried to spray the inside of the tire. Mr. Delgado helped me.

(Testimony of J. H. Beeson.)

Q. And what was the condition of that tire?

A. Well, it was melting inside. The tube was completely melted. There were small pieces of the tube left. The inside of the tire was all melted.

Q. Could you have told from your inspection whether there was a blowout or whether it was flat?

A. A closer inspection might have told, yes, but I didn't go into that.

Q. How long have you driven heavy diesel equipment? A. About five years.

Q. And from experience, could you relate approximately how far that tire had gone before it stopped?

A. Well, I would think it had to go quite aways. I have driven a flat tire when I knew it was flat, oh, I will say up to a hundred miles on an empty trailer, not on a trailer—not on a tractor, but on an empty trailer.

Q. Is that where this tire was?

A. This tire was on the trailer.

Q. And at the end of that run, what was the condition of the tire on your trailer as compared to this? A. It didn't hurt it.

Q. Would you repeat that?

A. It didn't hurt it. [296]

Q. Is that an unusual or usual situation to have a tire in that condition?

A. Oh, on an empty trailer, it is unusual to burn a tire.

Mr. Langmade: I believe that is all.

(Testimony of J. H. Beeson.)

Cross Examination

Q. (By Mr. Schoolfield): Mr. Beeson, you say it is unusual to burn a tire on an empty trailer; is that correct? A. That is correct.

Q. Would a driver then be on his guard for a flat tire on an empty trailer, as a rule?

A. Yes, a driver is more or less on guard at all times for a flat tire on his rig.

Q. Mr. Beeson, do you work at the El Paso end of the operation? A. Yes.

Q. Does Mr. Sullivan work with you at the El Paso end? A. Yes.

Q. And Mr. Grossheim, too, I take it?

A. Yes.

Q. Have you ever burned a tire in your driving experience? A. Yes.

Q. How many? A. One.

Q. Was that on an empty trailer?

A. No, it was on a loaded trailer, semi.

Q. Mr. Beeson, did you call Mr. Quisenberry and tell him about [297] helping Mr. Almada?

A. No, sir.

Q. You did not contact Mr. Quisenberry about that? A. No.

Mr. Schoolfield: I pass the witness.

Mr. Langmade: That is all.

Trial Examiner Doyle: You are excused, sir.

(Witness excused.)

Mr. Langmade: I call Joe Delgado.

JOE L. DELGADO

a witness called by and on behalf of the respondent, having been first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Doyle: Will you please give us your name and address?

The Witness: Joe L. Delgado, Box 771, Lordsburg, New Mexico.

Q. (By Mr. Langmade): And by whom are you employed, Mr. Delgado?

A. Texas Independent Oil Company.

Q. When were you employed?

A. Well, I can't think, but it was around the first part of May of this year.

Q. 1953? A. Yes, sir. [298]

Q. You were one of the earlier drivers to go on?

A. Well, I figure I was about the fourth or fifth driver.

Q. And are you still employed by the Texas Independent Oil Company?

A. Yes, that is true.

Q. Now, did you ever have any instructions from Mr. Quisenberry relative to the speed of your equipment?

A. Well, it wasn't necessarily to Mr. Quisenberry, you see, Harry Almada at that time was working for the company and he was more or less the test driver and he was the one who told us to take caution, and everything, on the road. He warned us, especially me, to bump my tires at

(Testimony of Joe L. Delgado.)

Deming and Las Cruces and not take any chances. And he was the one that actually did the hiring on my part.

Q. In other words, you were actually hired by Mr. Almada? A. Yes, sir.

Q. And he is the one that told you to bump the tires? A. Yes.

Q. And where did he tell you to bump them?

A. At Deming and Las Cruces. That is the same way coming back loaded.

Q. Now, I will ask you whether or not you were there the night that the tire was off the trailer that Mr. Beeson testified? A. Yes.

Q. How did you happen to be there? [299]

A. Well, I was following Harry. In other words, I was following Harry's truck and Beeson was following me. At that time Harry had a more superior truck, which is a 300, compared with our 200, and naturally we was behind. Well, beyond Deming, approximately, I was, oh, anywhere from 20 to 30 miles beyond Deming, when I saw some flares out in the road and I slowed down with precaution and a happened to see a No. 5 on the tank and I said, "Well, Harry must have a flat." At the same time I noticed a freight truck there belonging to Western and it was assisting Harry. At the same time I stopped a distance up and I noticed the smoke. And I came down to assist Harry and I seen this tire burned up. Me and Mr. Beeson held the tire and I saw Mr. Beeson spraying that Pyrene extinguisher, and we left that tire out in the field there

(Testimony of Joe L. Delgado.)

and on the return trip it cooled off and we brought it back to Tucson—to Lordsburg, and the Tucson driver brought it back here.

Q. Now, how many years of experience have you had driving heavy diesels?

A. Well, not very long. I have been trying to get on it three or four years. This is my first steady job. I have tried several locations but it just hasn't been my luck up until now.

Q. What was the condition of the tire?

A. The tube, the inner tube was burned beyond means of recognition. It just melted. Inside the cords were just about to break in flame. [300]

Q. Have you ever had a flat tire or similar experience?

A. No, I had a flat tire once in Willcox and I drove to Benson.

Q. How many miles is that?

A. Oh, I don't know, actually.

Q. Well, approximately, could you approximate it?

A. Maybe 30 or 35 miles, I would judge. I am not familiar with the distance on this end.

Q. What was the condition of that tire?

A. I stopped in Benson and I had that tire taken off and it was in good condition. I had it repaired and put back on the truck.

Mr. Langmade: I believe that is all.

Cross Examination

Q. (By Mr. Schoolfield): Mr. Delgado, could

(Testimony of Joe L. Delgado.)

you estimate the age of the tire that was burned off Harry Almada's truck?

A. No, sir, I couldn't. It was night and dark and the only thing in our mind was just to get that tire changed.

Q. Do you know whether or not it was a re-treaded tire? A. No, I couldn't swear.

Q. In other words, you just don't know at all the shape of the tire, do you? A. No.

Q. Was there a lot of tread on it, could you say that?

A. Well, like I told you before, it was dark and all we had [301] in our minds was to change that tire and keep it away from the tank; it was smoking, you know.

Q. Now, did you not testify that you had had a tire burn? A. No, I did have a flat once.

Q. You had a flat but the tire was not burned?

A. That is right.

Q. Were you loaded? A. Yes.

Mr. Schoolfield: I pass the witness.

Mr. Langmade: Nothing further.

Trial Examiner Doyle: All right, Mr. Delgado, you are excused, sir.

(Witness excused.)

Mr. Langmade: I call Mr. Wallsmith.

GEORGE W. WALLSMITH

a witness called by and on behalf of the respondent, having been first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Doyle: Have a chair and give us your full name and address.

The Witness: George W. Wallsmith, Berino, New Mexico.

Q. (By Mr. Langmade): And by whom are you employed, Mr. Wallsmith?

A. Texas Independent Oil Company.

Q. When did you first go to work for them?

A. First engaged in labor around the 3rd or 4th of April.

Q. In other words, you were one of the original employees?

A. Yes, sir.

Q. Are you still employed there?

A. Yes, sir.

Q. What is your occupation with them; what do you do?

A. I am a truck driver.

Q. Have you carried out the instructions of Mr. Quisenberry in El Paso or been around him in the conversations with the men a considerable amount of the time?

A. A few times, yes, sir.

Q. Has he ever interrogated you as to your union affiliateship or whether or not you belonged to the union?

A. No, sir, he hasn't.

Q. When you were employed, were you given any instructions relative to speed?

A. Yes, sir.

(Testimony of George W. Wallsmith.)

Q. What were they and by whom were they given?

A. At that time the speed was 55 miles an hour.

Q. Who told you that?

A. Mr. Quisenberry.

Q. And what about the bumping of tires?

A. Well, he could have told me that, but it is understood that you bump them.

Q. What is your understanding? [303]

A. Well, I have always tried to bump my tires every 50 or 60 miles.

Q. How long have you been engaged in truck driving?

A. Well, that is practically all I have ever done since 1933, I guess, when I first started.

Q. And what is the general practice relative to bumping tires?

A. I would say 50 to 60 miles.

Q. Did you ever burn up a tire in your experience?

A. Oh, yes, sir.

Q. And did you ever lose your employment on account of burning up a tire?

A. No, but I should have.

Q. I didn't quite hear your answer.

A. I didn't, but I should have.

Q. Why do you say you should have?

A. Well, there was not too much excuse to burn up the tire.

Q. Did you see this particular tire that was on Mr. Almada's truck?

A. No, sir.

Mr. Langmade: I believe that is all.

(Testimony of George W. Wallsmith.)

Cross Examination

Q. (By Mr. Schoolfield): How many tires have you burned in your career as a truck driver?

A. Oh, a couple.

Q. At least a couple? [304] A. Yes, sir.

Q. Any more than that?

A. Not that I remember.

Q. And you were not discharged for it; is that correct? A. That is right.

Mr. Schoolfield: I pass the witness.

Trial Examiner Doyle: Mr. Wallsmith, are you a member of the union?

The Witness: No, sir.

Trial Examiner Doyle: Is there anything further?

Q. (By Mr. Schoolfield): You work at the El Paso end, Mr. Wallsmith?

A. Yes, sir, from El Paso to Tucson.

Q. You live near El Paso? A. Yes, sir.

* * * * *

ERNEST V. SANDERSON

a witness called by and on behalf of the respondent, having been first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Doyle: Have a chair and give us your name and address. [305]

(Testimony of Ernest V. Sanderson.)

The Witness: Ernest V. Sanderson, 3118 Memphis, El Paso, Texas.

Q. (By Mr. Langmade): By whom are you employed, Mr. Sanderson?

A. Texas Independent Oil Company.

Q. And when were you employed?

A. I was employed the 25th day of April—of May.

Q. Of 1953? A. 1953.

Q. Are you presently employed by them?

A. Yes, sir.

Q. And in what capacity?

A. As a driver.

Q. Have you ever been—how many years have you had in transportation business in driving diesel equipment?

A. In diesel equipment, I have only had a couple of years experience in diesel.

Q. Have you ever been a member of the Teamsters Union? A. Yes, sir.

Q. Were you ever questioned by Mr. Quisenberry relative to your membership in the union?

A. No, sir.

Q. You haven't? A. No, sir.

Mr. Langmade: I believe that is all.

Mr. Schoolfield: No questions. [306]

* * * * *

Mr. Langmade: I would merely like to say this, Mr. Examiner, and not to review the facts in this case, but this is something that does occur to me that should be kept in mind, and that is that this

was an entirely new operation; it started from Mr. Quisenberry's coming to Tucson and El Paso and building it up from the middle of April of 1953 up to the present date and he now has, he testified, some 26 drivers in his employ. I think that the Examiner could take judicial notice of the fact that we have been through an era of steady employment and to recruit in the Tucson-El Paso area a credible number of men, that every one of those men is not going to be an excellent driver to drive the equipment which was testified to here cost approximately \$30,000 per unit for truck and trailer. Since the operation began, Mr. [311] Quisenberry testified he now has 26 men on his payroll. There were approximately, I believe he said, between six and eight that quit for reasons of their own, and seven men were discharged, only seven out of that total, and of those seven, six of those men were discharged who have testified before the Examiner. And it would seem to me that in any organization that you would recruit for an operation such as this, that out of that total number of men that that would not be an unreasonable amount of men to discharge in that period of time between the middle of April, including up to date, which is the early part of October. I feel that it has been more or less of a good record in view of the conditions that existed.

* * * * *

Trial Examiner Doyle: The motion will be granted.

Gentlemen, before I read this opening statement with which I conclude, I am going to say this to

the representatives of the [312] parties here concerned, that it has rarely been my experience to find a case so ably presented with a minimum of technical argument as this has been presented by all of the representatives of the parties. I want to compliment you all. You presented your case fully and forcefully and I think with patience and courtesy, and I do believe that this record should have my compliment to the parties who have conducted this hearing.

Now, there is one other point I am going to mention to you, and that is this: And I am going to propose this to you because there are a great many of the people who are here involved in one way or another in this case here in this hearing room. We have had a very thorough hearing here and counsel have ably presented the contentions for both sides here. I suppose it is normal for every litigant in a lawsuit to view the testimony in such a way that he thinks that there is only truth and justice on his own side and that, "I would certainly have to be some sort of a simpleton if I believed the testimony advanced by the other side." It is a natural thing when you are a litigant here and all of you people are so concerned with it here. But all I will say to these experienced counsel here who represent the various sides, and to you, is this: That as one views this testimony as an outsider and hears it, he sees factors of varying degrees, and I say varying degree because it is my hope that I will leave you all mystified as to how I feel about this case, but I do want to point out to you that

there is a way of solving [313] your problems better than leaving it to me or the Board, and that is to sit down and consider these matters and counsel can before the issuance of intermediate report, compromise and settle this case. [314]

* * * * *

CERTIFICATE

This is to certify that the attached proceedings before the National Labor Relations Board for the Sixteenth Region in the matter of: Texas Independent Oil Company and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers Local 310, were had as therein appears, and that this is the original transcript thereof for the files of the Board.

ACME REPORTING COMPANY,
Official Reporters

/s/ By [Illegible]

Field Reporter



No. 14680

**In the United States Court of Appeals
for the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

TEXAS INDEPENDENT OIL CO., INC., RESPONDENT

**ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD**

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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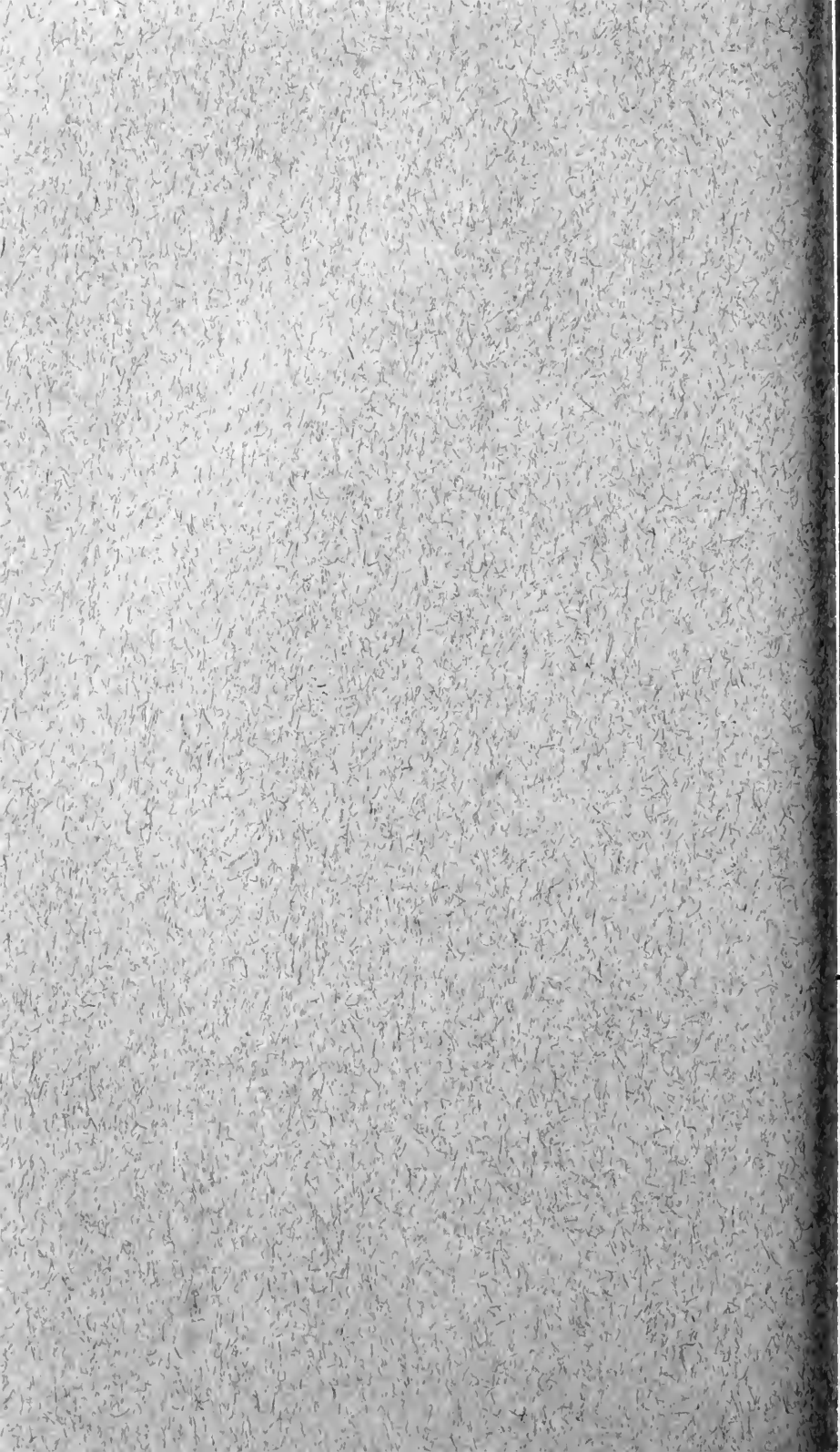
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FILED

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 14680

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

TEXAS INDEPENDENT OIL CO., INC., RESPONDENT

*ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD*

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board pursuant to Section 10 (e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Section 151, *et seq.*),¹ for the enforcement of its order issued against respondent on April 30, 1954, following proceedings under Section 10 of the Act. The Board's decision and order (R. 97-105)² are reported at 108 N. L. R. B. No. 100. This Court has jurisdiction of the proceed-

¹ The relevant provisions of the Act are printed in Appendix, *infra*, pp. 21-23.

² References designated "R" are to the pages of the printed record. Whenever, in a series of references a semicolon appears, the references preceding the semicolon are to the Board's findings, and those following are to the supporting evidence.

ing under Section 10 (e) of the Act, the unfair labor practices having occurred within this judicial circuit at Phoenix, Arizona.³

STATEMENT OF THE CASE

I. The Board's findings of fact

Briefly, the Board found that respondent violated Section 8 (a) (1) and (3) of the Act by its discriminatory discharge of employees Van Horn, Cox, Richins, and Almada. The Board also found that respondent, in violation of Section 8 (a) (1) of the Act, interrogated its employees as to their union activities and otherwise coerced and restrained them in the exercise of rights guaranteed to them by Section 7 of the Act. The findings and supporting evidence are detailed below.

A. Respondent's interrogation of job applicants as to their union affiliation and sympathies

In April 1953, respondent discontinued its practice of importing petroleum products from refineries by railroad or contract carriers and, instead, set up its own trucking system (R. 25; 238). Respondent's new system of operations necessitated the hiring of truck drivers, a function which it delegated to its manager, M. A. Quisenberry (R. 26; 238). Quisenberry admitted at the hearing before the Board that he had interrogated prospective employees about their past and present union affiliations and had told them that he did not want the job organized as a union

³ Respondent, an Arizona corporation, is engaged in the transportation and sale of gasoline and petroleum products. It is admitted that respondent is engaged in interstate commerce and no jurisdictional question is here presented (R. 24-25; 117).

job until the operation of the truck route had become firmly established. Quisenberry also acknowledged that he had urged the employees to refrain from union activities (R. 26-27; 241, 253, 258, 262).

The employees first evinced interest in union activities at the plant early in May 1953 (R. 29; 192). On May 15, 1953, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL (hereafter referred to as the Union), filed with the Board a petition to hold an election to determine the employees' choice of bargaining representative (R. 38; 140).⁴

B. The discriminatory discharges

1. *Kenneth Van Horn*

Van Horn was hired by respondent as a truck driver on May 2, 1953 (R. 28; 189). When he was interviewed for the job, Company Manager Quisenberry, asked him if he was a union member (R. 28; 193). Van Horn replied in the affirmative, stating that he was on a withdrawal card from a local union in Long Beach, California (R. 28; 193).

On May 12, Quisenberry approached Van Horn while he was waiting for his truck at 84 Truck Shop in Tucson (R. 28, 29; 189-190). Quisenberry asked Van Horn to identify the man with whom he had talked on the previous day at Phoenix (R. 29; 191). When Van Horn appeared surprised, Quisenberry explained to Van Horn that while he was unloading gasoline at Blakely No. 1, he (Van Horn) had told

⁴ The records of the Board disclose that the Union withdrew the petition on October 30, 1953, and no election was held.

an elderly man about the Union's organizational activities; that this man had in turn informed Steele, respondent's vice president, that Van Horn was investigating the Union among the drivers, and that as a result Steele had ordered Quisenberry to discharge Van Horn (R. 29; 191-192). Van Horn admitted to Quisenberry that he had talked to the man but stated he had simply told him that there "was talk about passing out blanks" and organizing a union sometime in the future (R. 29; 192). Van Horn denied that he had attempted to "instigate the union" and remarked to Quisenberry that he was giving him a "chicken deal." Despite Van Horn's explanation and protest, Quisenberry gave him his severance check which had already been prepared (R. 29-30; 192, 193). Later in the day Quisenberry admitted to Van Horn that he had given him a "chicken deal" but told Van Horn that his hands were tied and that he could do nothing about the matter (R. 30; 194).⁵

2. John Cox

Cox commenced his duties as a truck driver for respondent on April 15 (R. 31; 178). At the time he made application for the job, Quisenberry asked both Cox and Jensen, another applicant, if they were union members (R. 31; 179). Cox replied that he was not a union member, while Jensen stated that

⁵ Van Horn was rehired by respondent on September 28 (R. 30; 195). At that time Quisenberry remarked, "I am not going to tell any man how to vote but I still want it nonunion" (R. 30; 196). When Van Horn asked Quisenberry if he would get his seniority standing, he replied that he would provided he went nonunion (R. 30; 198).

both he and Cox had been union members but were delinquent (R. 31; 179).

About May 1, as Cox was getting his load papers from Quisenberry, the latter asked him if he was keeping his union book paid up (R. 32; 180). Cox replied that he was, whereupon Quisenberry questioned him as to how he would vote if an election were held (R. 32; 180). Cox stated that he was undecided as to how he would vote (R. 32; 180). Cox gave a similar answer a few days later when Quisenberry asked him again to declare his intentions (R. 32; 180).

On May 15, after completing his run to Phoenix, Cox called Quisenberry for further instructions (R. 32; 181). Quisenberry requested Cox to report to him at his home (R. 32; 181). At this meeting Quisenberry again asked Cox how he would vote in the event an election were conducted (R. 32; 181). After listening to Cox's reply that he was still undecided, Quisenberry informed Cox that he was being discharged for driving in excess of 55 miles an hour, the established speed limit (R. 32; 182). Quisenberry admitted at the hearing that he also asked Cox if he was still keeping up his union book and that Cox replied that he was doing so (R. 258).

A few days after Cox was discharged, Quisenberry told employees Almada and Richins, who were later to be discharged, that he had fired Cox because he had lied about his union membership and that he had hired Cox and granted him a loan on the assurance from Cox that he was not a union member (R. 34-35; 134-135). Quisenberry also told the two

employees that Cox would have caused him "trouble" later (R. 35; 135).⁶

3. *E. W. Richins, Jr.*

Richins was hired by respondent as a truck driver on April 28 (R. 38; 158). When Richins called Quisenberry to inquire about the job the latter asked Richins about his union standing to which Richins replied that he had a withdrawal card since 1946 (R. 38; 159). Later at the interview Richins asked Quisenberry why he had shown an interest in his union status (R. 38-39; 159). Quisenberry replied that he was looking for a non-union crew but that in view of Richins' long period of inactivity in the Union he did not believe Richins would cause him worry (R. 39; 159). Quisenberry then promised Richins the next truck into Lordsburg and stated that he paid better than union scale in order to keep the job non-union (R. 39; 159).

On May 22, Quisenberry happened to meet Richins and employee Almada in front of the latter's home in Lordsburg (R. 39; 160). Quisenberry remarked that although he knew that such an inquiry constituted an unfair labor practice he wanted to ask Richins and Almada how they were going to vote in the election (R. 39; 160). Richins, who was reluctant to jeopardize either his withdrawal card or his job, replied, "I couldn't cut my nose off to spite my face" (R. 39; 161). Almada replied that although he would

⁶ On cross-examination Cox testified that he was a union member at the time he was hired and that he lied to Quisenberry in order to obtain the job (R. 33-34; 185).

not instigate any union activity he was for the union and would vote accordingly (R. 39; 138, 161).

On May 25, Richins went to the Dixie Drive Cafe in Lordsburg where he ordinarily commenced his run (R. 40; 162). When he arrived there Richins observed that there were three trucks as well as three drivers (R. 40; 162). One of the drivers asked Richins which truck he was going to take (R. 40; 162). Richins replied, "It looks like I am not going to take" (R. 40; 162). Quisenberry, who was present, then remarked, "They had put the pressure on [me] in Phoenix" and went on to tell Richins that he was being discharged for manhandling the gears on his truck (R. 40; 162, 163).

A short time after Richins was discharged Quisenberry remarked to employees Almada and Beeson that he had been reluctant to discharge Richins, for he was "a good fellow," but that he had done so because Richins' cousin was encouraging him on the Union and that Richins would vote against respondent in the election (R. 42-43; 133). Quisenberry made a similar remark again to Almada a few days later (R. 43; 134).

4. *Harry Almada*

Almada worked as a truck driver for respondent from the date of his hire, April 13, until he was discharged on June 3 (R. 45; 121, 125). Two days before Almada was hired, Quisenberry went to his home and asked him if he was looking for employment as respondent was starting a new trucking operation between Lordsburg and El Paso (R. 45; 122).

When Almada indicated that he was interested in a job, Quisenberry asked him if he was a union member (R. 45; 123). Almada replied that he had a union book and was in good standing (R. 45; 123). Upon hearing this, Quisenberry said, "Well, that lets you out, because I am not hiring any union men. I am hiring all non-union men because I don't want a union outfit. I don't want no trouble with the Union and I don't want to be hampered or delayed in any way by the union" (R. 45; 123). Quisenberry then told Almada that if he would drop his union book and withdraw from the Union he would hire him (R. 46; 123). Almada agreed to comply with this request and upon Quisenberry's insistence promised not to instigate any union activities or to do anything which would cause "trouble" between the Union and respondent (R. 46; 124).

When Almada reported on the job April 13, Quisenberry told him that he would ride as far as El Paso in order to give Almada a "test hop" (R. 46; 125). During the "test hop" Quisenberry remarked that he was at one time a union member but that he did not begin to improve his lot until he worked without the union (R. 46; 125). Quisenberry then went on to say that Almada's job would also be a "good deal" if there was no union interference (R. 46; 125). The two men then discussed the 55 mile per hour speed limit and respondent's policy that tires should be "bumped"⁷ at approximately 60-70 mile intervals

⁷ A process by which all the dual tires on the truck are kicked or hit with a tool to make certain they are properly inflated (R. 46; 146).

(R. 46-47; 126, 242). Quisenberry told Almada that he was the only person who read the tachograph charts showing the speed of the trucks and that the charts could be disregarded if it was necessary to reach the El Paso refinery before it closed (R. 47; 128, 129).

Almada was an experienced truck driver and Quisenberry had a high regard for his ability (R. 47; 246, 274). Quisenberry at one time offered Almada a supervisory position and at various times hired employees whom Almada referred to him (R. 47; 131, 246).

About the middle of May, Quisenberry called Almada and informed him that he was "in a terrible spot" as Steele, respondent's vice president, had ordered Almada's discharge because he was "union all the way through" (R. 48; 135). Quisenberry then told Almada to send his withdrawal card back to Fred Bone, the union representative, and to tell Bone that he wanted no part of the Union (R. 48; 136). When Almada appeared reluctant to do this, Quisenberry remarked "Well, by George, there is nothing else you can do. It is either that or else" (R. 48; 136). Almada then explained to Quisenberry that he had kept his word and had not caused any union activity but Quisenberry retorted that Bone had described Almada as a staunch Union supporter, "ready" to "follow whatever the Union told [him] to do" (R. 48; 136). When Almada later questioned Bone about his conversation with Quisenberry, Bone denied that he had ever talked with him (R. 48; 136). Almada called

Quisenberry and told him of Bone's denial, whereupon Quisenberry remarked, "Well, I am sorry, but I have to do something to tie my men in one side of the fence or the other" (R. 48-49; 136). Almada then explained to Quisenberry that he could not lose his withdrawal card as he might need it in the future (R. 49; 136). Quisenberry replied, "Either that, or else" (R. 49; 136). When Almada remarked that Quisenberry should do whatever he thought was right, the latter told Almada that he would confer with Steele on the matter and inform Almada of the result, but that in the meantime he should not take his usual run (R. 49; 137). Almada, however, did make his run as his "breaking partner" informed him later that everything had been fixed up (R. 49; 137).

About 11 p. m. on June 2, Almada went to the Dixie Truck Stop at Lordsburg to fuel his truck (R. 49; 141, 142). He was delayed at the pumps almost two hours because three other trucks were being serviced (R. 49; 142). With the delay, Almada was worried that he would not make the schedule so he attempted to make up lost time (R. 49; 142). Almada had reached a point between Deming and Las Cruces when he noticed that something was wrong (R. 49; 148). Upon discovering that one of the tires was flat and burning, Almada went for his fire extinguishers but found them dead (R. 49; 143). With the assistance of other drivers, Almada removed the tire leaving it in the desert to cool and then continued on his run (R. 49-50; 143). On the return trip Almada picked up the tire and cradled it back on the trailer (R. 50;

143). Later that day Almada reported the incident to Quisenberry (R. 50; 143). About midnight Quisenberry called Almada again and advised him that he was being replaced by George Wallsmith as he could not have the employees burning tires up and down the road (R. 50; 143). Wallsmith was not a union member and admitted at the hearing that he had burned tires on at least two occasions during his career as truck driver and was not discharged therefor (R. 100; 310, 311).

C. Respondent's further interference, restraint, and coercion

During this same period in May and early June, Company Manager Quisenberry asked employee Bailey at the time he was hired if he was a union member and then instructed him to note on his employment application that he was, in fact, a member (R. 52; 212, 213). Quisenberry had obtained a supply of these application forms at a Tucson stationery store and under the section "Activities other than religious" requested applicants to note their union affiliation (R. 55; 239). Quisenberry also asked employees Turner and Johnson about their union membership when they were interviewed, and later advised Johnson to drop his union book (R. 58, 35; 157, 218, 219).

II. The Board's conclusions of law

Upon the foregoing facts, the Board concluded that respondent had discharged employees Van Horn, Cox, Richins, and Almada because of their union sympathies and activities and not for the reasons ad-

vanced by respondent (*infra*, pp. 15-17), thereby violating Section 8 (a) (3) and (1) of the Act (R. 85, 98).⁸ The Board also concluded that Quisenberry's interrogation of employees as to their union activities, his urging of employees to refrain from such activities, and his placing in effect a hiring plan to keep the employees from engaging in union activities constituted interference, restraint and coercion violative of Section 8 (a) (1) of the Act (R. 64-69).

III. The Board's order

The Board's order requires respondent to cease and desist from the unfair labor practices found and from in any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act (R. 102, 103). Affirmatively, the Board ordered respondent to reinstate employees Van Horn, Cox, Richins, and Almada with back pay and to post the usual notices (R.103-104).

⁸ The Trial Examiner, although noting that Quisenberry's conduct "gives rise to the strongest kind of inference" that Almada's discharge was discriminatorily motivated, nevertheless concluded that he was discharged for cause, namely, for burning the tire on his truck (R. 82, 83). In reversing the Examiner's conclusion, the Board accepted all of his credibility determinations but drew different inferences from the facts found (R. 98-100). The "final obligation to determine the facts as to the matters at issue here rests with it [the Board], and * * * in all cases where examiner and Board differ, the Board's findings [if] supported by evidence * * * should be sustained" *NLRB v. Akin Products Co.*, 209 F. 2d 109, 111 (C. A. 5). See also *NLRB v. Waterfront Employers of Washington*, 211 F. 2d 946, 953 (C. A. 9).

ARGUMENT

- I. Substantial evidence on the record considered as a whole supports the Board's finding that respondent discriminatorily discharged employees Van Horn, Cox, Richins, and Almada, in violation of Section 8 (a) (1) and (3) of the Act**

The evidence summarized above fully supports the Board's finding that the discharges of Van Horn, Cox, Richins, and Almada were discriminatorily motivated. Indeed, the admissions of Company Manager Quisenberry that the employees' union sympathies motivated the discharges, without more, support that conclusion.

Thus Quisenberry admitted to Van Horn that Vice President Steele had ordered his dismissal after learning that he was instigating the Union among the drivers. Quisenberry conceded that he had given Van Horn a "chicken deal," explaining that his hands were tied and that he could do nothing about it (*supra*, p. 4). Quisenberry also admitted to two employees that Cox was released because at the time he was hired he represented himself as a non-union employee while, as a matter of fact, he was a union member in good standing (*supra*, pp. 4-5). He acknowledged that although he was reluctant to dismiss Richins (whom he characterized as "a good fellow"), he had to get rid of him because of his union ideas and because he thought Richins would vote against the Company in the forthcoming Board election (*supra*, p. 7). Finally, Quisenberry informed Almada that Vice President Steele ordered his discharge because he was "union all the way through." Quisenberry made it clear that Almada would have

to turn in his union card and resign from the Union "or else" face dismissal (*supra*, pp. 9, 10).⁹

Respondent's motive for punishing these employees is not difficult to discern. Company Manager Quisenberry, who hired and fired the employees, admittedly opposed the unionization of the plant. He interrogated job applicants as to their past and current union affiliations, directed employees to refrain from union activities, and urged them to repudiate the Union. As the Trial Examiner stated (R. 64-65): "In practically all hiring Quisenberry * * * left the strong inference in the minds of the employees that their employment resulted from the fact that they were either not in good standing in the Union, or not inclined to promote union activities on the job and that their chances of continued employment would be seriously affected by their engaging in union activities."

The targets of Quisenberry's questioning included all of the four employees involved in this proceeding. All four were interrogated as to their union standing at the time of their employment. One of them, Almada, formerly a leading union man (R. 46, 81-82; 123), was hired on the express condition that he drop his union card, resign from the Union, and refrain from any union activity (*supra*, p. 8). After

⁹ The foregoing findings of the Trial Examiner, which were adopted by the Board, are based on the testimony of employees. Quisenberry either categorically denied or could not recall the statements attributed to him. "For obvious reasons, questions of credibility were for the Examiner." *N. L. R. B. v. State Center Warehouse*, 193 F. 2d 156, 157 (C. A. 9); *N. L. R. B. v. Dant*, 207 F. 2d 165, 167 (C. A. 9).

their employment, Almada, Cox and Richins were queried as to their voting intentions. Richins was informed that he would be paid better than the union scale in order to keep the job non-union and Almada was assured that his job would be a "good deal" if there was no union interference (*supra*, pp. 6, 8).

The timing of the discharges is also significant. Van Horn's discharge took place within one day after respondent learned of his union activity (*supra*, p. 3). Cox was discharged after refusing to disclose to Quisenberry his voting intention, Richins after revealing his intention to vote for the Union, and Almada after rejecting Quisenberry's request to resign from the Union. Surely, "the coincidence in time * * * would seem somewhat significant" (*N. L. R. B. v. Geraldine Novelty Company, Inc.*, 173 F. 2d 14, 18 (C. A. 2)).¹⁰

The Board's conclusion that the discharges were discriminatorily motivated is fortified by the fact that the reasons advanced for the dismissals do not stand under scrutiny. *N. L. R. B. v. Dant*, 207 F. 2d 165, 167 (C. A. 9). Respondent contends that Van Horn was fired for habitual tardiness. Yet Quisenberry re-hired him four months later, an action which, as the

¹⁰ The Board's inference of discrimination is not rebutted by the fact that respondent did not discharge other union adherents. "The fact that respondent retained some union employees does not exculpate him from the charge of discrimination as to those discharged." *N. L. R. B. v. W. C. Nabors*, 196 F. 2d 272, 276 (C. A. 5), certiorari denied, 344 U. S. 865 and cases there cited. "* * * discouragement may be effected by making 'an example' of some of them." *N. L. R. B. v. Shedd-Brown Mfg. Co.*, 213 F. 2d 163, 174-175 (C. A. 7).

Board stated (R. 71), is inconsistent with Quisenberry's claim that Van Horn was so undependable that his employment could not be continued. Respondent contends that Cox was discharged for driving in excess of the Company's speed limit of 55 miles per hour. However, as the Board observed (R. 73), the fact is that "the Company's speed limit was more honored in the breach than in the observance by the drivers." Quisenberry had repeatedly told the employees that it was important for the drivers to return to the refinery on time, even if to do so entailed violation of the speed limit (R. 73; 128-129, 257).

As to Richins, respondent claims that his discharge was occasioned by transmission failure in his truck. However, the record shows that with respect to this particular truck, these failures not only preceded his handling of the truck but continued after his discharge (R. 78-79; 254, 278, 279). That the defect was not caused by Richins' alleged manhandling of the gears is established by the fact that the gear ratio originally installed in the truck was found unsuitable to the heavy duty which the truck was required to perform and had to be replaced with a lower gear ratio after Richins' discharge (R. 79; 278). Moreover, two drivers, in addition to Richins, had handled the same truck and Quisenberry's sole basis for the conclusion that Richins was at fault was the fact that Richins was the least experienced of the three (R. 80; 280-281).

Finally, respondent contends that Almada was fired because he failed to "bump" his tires for about 80 miles (R. 100), and as a result burned up a tire on the road. However, as the Board pointed out

(R. 160; 22), "although it was agreed that the better practice was to bump tires every 60 or 70 miles, Almada's practice conformed to a set of rules issued over Quisenberry's signature, stating in part: 'Drivers will bump tires at least every 80 miles. * * *'" No actual damage other than to the tire resulted (R. 100; 243). Moreover, Almada was replaced by a driver who was not a union member and who testified that he had burned tires on at least two occasions during his career as a truck driver and was not discharged therefor (R. 100; 311). Under all the circumstances surrounding the discharge, the Board reasonably inferred (R. 101-102) that "the burning of the tire was a mere pretext which the Respondent seized upon in an attempt to conceal its unlawful motive."

For all of the foregoing reasons the Board properly rejected respondent's contention that the employees in question were discharged for cause. As in *N. L. R. B. v. The Blanton Co.*, 121 F. 2d 564, 570 (C. A. 8), "the reasons urged [for the discharges] * * * would have had more persuasive force if the employer's displeasure at their union activity had not been specifically expressed to each of them." Moreover, even if it is assumed, as respondent contends, that it had ample grounds for discharging the employees, the Board was justified in concluding that none of the Company's given reasons was *the actual ground* for the dismissal. "The existence of some justifiable ground for discharge is no defense if it was not the moving cause." *Wells, Inc. v. N. L. R. B.*, 162 F. 2d 457, 460 (C. A. 9). See also *N. L. R. B. v.*

L. Rooney & Sons Furniture Mfg. Co., 206 F. 2d 730, 737 (C. A. 9), certiorari denied, 346 U. S. 937; *N. L. R. B. v. Whittin Machine Works*, 204 F. 2d 883, 885 (C. A. 1).

II. Substantial evidence on the record considered as a whole supports the Board's finding that respondent interfered with, restrained, and coerced its employees in violation of Section 8 (a) (1) of the Act

The record establishes that respondent employed application forms requiring applicants for jobs to disclose their union affiliations, questioned the applicants concerning their union standing, told employees that respondent hired only non-union men and paid higher wages to keep the job non-union, encouraged employees to withdraw from the Union, interrogated them concerning their voting intentions, exacted a promise from an employee not to instigate any union activities, instructed another to stop paying union dues, and told employees that the Company had fired an employee because he had concealed his union sympathies and membership. Settled judicial authority establishes that such conduct constitutes interference, restraint, and coercion in violation of Section 8 (a) (1) of the Act. See *N. L. R. B. v. Anderson*, 206 F. 2d 409 (C. A. 9), cert. den. 346 U. S. 938; *N. L. R. B. v. West Coast Casket Co.*, 205 F. 2d 902, 904 (C. A. 9); *N. L. R. B. v. Radcliffe*, 211 F. 2d 309, 314, 316 (C. A. 9), cert. den. 348 U. S. 833; *N. L. R. B. v. General Shoe Corp.*, 207 F. 2d 598 (C. A. 6); *Texarkana Bus Co. v. N. L. R. B.*, 119 F. 2d 480, 482-483 (C. A. 8).

Contrary to respondent's contention the interrogation in this case does not come within the rule that

“mere words of interrogation * * * by an employer with no anti-union background and not associated as a part of a pattern or course of conduct hostile to unionism * * * cannot, standing naked and alone, support a finding of a violation of Section 8 (a) (1).” *Sax v. N. L. R. B.* 171 F. 2d 769, 773 (C. A. 7). Here, the interrogation was conducted by an admittedly anti-union manager, who repeatedly urged employees to repudiate the Union, and openly suggested that their jobs depended on abstention from union activities. Moreover, the interrogation was followed by the discriminatory discharge of four employees. Cf. *N. L. R. B. v. Chautauqua Hardware Co.*, 192 F. 2d 492, 494 (C. A. 2). See also *N. L. R. B. v. Syracuse Color Press, Inc.*, 209 F. 2d 596, 599 (C. A. 2), cert. den. 347 U. S. 966; *N. L. R. B. v. Kropp Forge Co.*, 178 F. 2d 822, 827-828 (C. A. 7), cert. den. 340 U. S. 810; *Union News Co.*, 112 N. L. R. B. No. 57, 36 L. R. R. M. 1045, 1046, distinguishing *Blue Flash Express, Inc.*, 109 N. L. R. B. No. 85, 34 L. R. R. M. 1384, relied on by respondent.

Respondent's further contention that it could not be held responsible for Quisenberry's acts because he acted without authorization and because respondent subsequently ordered him to cease his interrogations, is without merit. Quisenberry was a high-ranking management representative who hired and fired employees and supervised their operations. “The law is well settled that under circumstances like those shown here, an employer is accountable for unfair practices resulting from the activities of his supervisory employees not only when the proof shows

direct authorization but whenever circumstances are such that the employees would have just cause to believe that the supervisors were acting for and on behalf of the management." *Birmingham Post Co. v. N. L. R. B.*, 140 F. 2d 638, 640 (C. A. 5). See also *N. L. R. B. v. Geigy Co., Inc.*, 211 F. 2d 553, 557 (C. A. 9), cert. den. 348 U. S. 821, and cases cited therein; *N. L. R. B. v. Schaefer-Hitchcock Co.*, 131 F. 2d 1004, 1007 (C. A. 9). Moreover, the Act specifically provides in Section 2 (13) that "In determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

Accordingly, the Board properly concluded that respondent, independently of its violations of Section 8 (a) (3), violated Section 8 (a) (1) of the Act.

CONCLUSION

For the reasons stated above, the Board's order should be enforced in full.

Respectfully submitted.

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MAY 1955.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; * * *.

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *.

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as herein provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *.

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *.

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent,

or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

No. 14680

**In the United States Court of Appeals
for the Ninth Circuit**

National Labor Relations Board,

Petitioner

v.

Texas Independent Oil Company, Inc.,

Respondent

**ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD**

BRIEF FOR RESPONDENT

LANGMADE and SULLIVAN
Attorneys for Respondent

FILED

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**In The United States Court of Appeals
for the Ninth Circuit**

No. 14680

National Labor Relations Board,

Petitioner

v.

Texas Independent Oil Company, Inc.,

Respondent

BRIEF FOR RESPONDENT

Petitioner in the present proceedings asks enforcement of an order for back pay to four employees of Respondent, as follows:

Kenneth L. Van Horn	\$1,259.62
John E. Cox	238.90
E. W. Ritchins, Jr.	840.46
Harry M. Almada	1,141.46

In addition to the order for back pay, the Board had directed the reinstatement, and a posting of a Notice that the Respondent had been ordered to cease and desist from unfair labor practices.

The order was fully complied with, except for payment of back pay. The men declined reinstatement. They had been re-employed, and two men, E. W.

Ritchins, Jr., and John E. Cox, had received more pay from their new employment than they would have received had they continued in the Respondent's employment, one by \$398.33, and the other \$481.13.⁽ⁱ⁾

The Company's Operations

It was a new operation for the Respondent, beginning the middle of April, 1953, with the employment of two truck drivers.

The Respondent undertook to deliver its gasoline from El Paso to Phoenix, a distance of 427 miles, with heavy laden gasoline trucks.

A division point was established in Lordsburg, N.M., midway between the points, where a driver from Phoenix delivered his truck to another driver who drove on to El Paso, and a returning driver delivered his gasoline-laden truck to one who drove on to Phoenix.

M. A. Quisenberry was employed to set up the operation, with headquarters, first in Tucson, and later at Lordsburg, where the acts complained about in this proceeding were performed. (R.238).

The Complaint was filed against the Company by a Local Tucson Labor Union who, it seems had attempted an organization of the workers some time after the operations began. It appears that Quisenberry requested the men not to organize until "he got rolling", as he expressed it.

This complaint (R.3) alleged there were eleven men employed at that time and that the Company was dis-

(i) Reference is made to the Petition for Rehearing.

couraging membership, and complained that four men had been discharged.

A hearing was ordered, and at the time of hearing, in October, there were twenty-six men then employed, and some fourteen others who had been employed and let go in the meantime, were on the day of hearing submitted as complaining. After hearing, the Examiner dismissed the complaint as not having any merit, except for three employees.

The Board, on review, has affirmed the action of the Examiner, and added the name of Almada, naming four employees as having been discharged.

The Board does not find that there was not cause for discharging, but challenges the "motive" of the Company.

As a legal proposition, Section 10 of the Act provides: "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause."

The defense of the respondent is predicated upon the proposition that the men to whom back pay has been awarded were discharged for cause. The cause for discharge was stated to the men at the time of their suspension, and the existence of the cause was not disputed by the men. It was not a fictitious or trumped up charge. The acts committed for which the men were discharged were not manufactured out of whole cloth. The cause for removal actually existed, and there is no finding by the Board, or the Examiner, that the cause did not exist, or was not sufficient in itself, in the exercise of good management, to justify dismissal.

The case of the General Counsel is premised upon the proposition that the "motive" of the Company was base and illegal, and as expressed by the Examiner, "Quisenberry's antipathy to the union".

Quisenberry's "antipathy," so-called, to the union is predicated upon conversations had with the men at the time of employment, and as described in the Examiner's report, (R.66-68), setting forth specific unfair labor practices charged to Quisenberry.

We respectfully invite the Court's attention to these several specific findings, and to demonstrate it was solely the conversations of Quisenberry, a supervisor employee of the Company, engaged in the first six weeks of operations.

No proof, evidence, or attempt was made to connect the Company policy, instructions or approval with these alleged unfair practices. Section 2 (13) does not deny the Company the right to deny, as it did, the authorization or approval, and shift a burden to the Government to then establish the fact with proof.

Quisenberry's "antipathy to the union", upon which the Company's motive and intent to commit illegal acts, and unfair labor practices in discharging four employees, is evidenced, says the Government, by specific instances and acts of Quisenberry, set forth in the Examiner's findings. (R.66-68).

The time these alleged acts took place becomes important because it evidences, and establishes that the Company itself, through its management, the President, immediately upon learning, and being advised

Quisenberry had committed the acts alleged, repudiated, and put a stop to the very acts claimed to be the acts of the company.

The unfair labor practices found by the Examiner, and approved by the Board as having occurred, that estopped the Company from thereafter discharging an employee for cause, consisted of, (a) interrogating Almada as to his union affiliation when he was employed April 11, (b) statement made by Quisenberry to Almada, May 30, why he had discharged Rinkins, (c) statement made by Quisenberry that Cox had lied to him about union affiliation, on May 24, (d) and on May 15 instructing Almada to have nothing to do with the union; by interrogating Cox, May 15, whether he was keeping up his union book; on April 12 interrogating Jenson and Cox as to their union affiliation, and interrogating Turner on April 13 as to his union affiliation; on May 25 he interrogated Bailey as to his union affiliation.

That these acts were not the Company policy, was testified to by the witness (R.292-293) at the instance of the Examiner, who developed that Quisenberry did this without authority and that, when the Company found out about his alleged acts, he was instantly told to stop, and he did. The provision of Sec. 2 (13) of the Act are not applicable, as urged by Government, because the Company ordered it stopped. The "agency" was not denied, but the acts were not authorized, and when the Company learned of the "interrogation" the Company acted, and before charges were made.

The Company's offices and headquarters are in Phoenix, Arizona, where the office of the President and management is maintained. Quisenberry began his

operations in Lordsburg, New Mexico, some two hundred miles distant, where the conversations alleged to constitute "unfair" labor practices occurred. Several men had been employed by Quisenberry the first few weeks of operations without the Company's knowledge of the questions propounded to prospective employees relative to their union affiliation.

This was a new operation in the transportation of gasoline for the Company. Common or Contract Carriers had up until this operation transported the Company's products from California to Arizona, and the new operation undertook to transport gasoline from Texas to Arizona, and with the Company's own facilities.

There were no previous anti-union activities chargeable to the Respondent. There was no policy or history of the Company established in regard to employing either union or non-union men, and the President, and active manager of the Company's affairs immediately vetoed, and directed a discontinuance of, the acts complained of herein and for which the Board directed the Company to cease and desist.

This discontinuance was effected immediately upon learning of the unfortunate statements made by Quisenberry to prospective employees. It was corrected before any complaint was filed, and before the hearing, and before the entry of any order by the Board.

Mr. Steele, the President of the Company, corrected the things complained about, forbidding the interrogating and discussing union matters, immediately upon hearing that Quisenberry had talked about such matters (See R.292-293).

There is not a scintilla of evidence that Quisenberry or the Company engaged in any of the practices complained of after knowledge was brought home to the Company, and after the President ordered and directed Quisenberry to stop. Assuming that Section 2 (13) is sufficient to convict a person of complicity without proof, of an illegal act, it does not prevent a denial, and evidence that it was not authorized or approved. If the rules of Court are to be followed, and complicity is denied, then the Government is required to offer proof of complicity. This was not done. No evidence that the Company directed or approved the agent's illegal acts was submitted.

The Board's Order

It is true the Board ordered notices to be posted that the Company would henceforth cease and desist from illegal practices, which notice was posted. We do not, however, acknowledge that this was a confession that illegal practices had ever been authorized or approved. The Examiner and Board well knew when the order was issued that the Company had repudiated, and was not so engaged, when the cease and desist order was promulgated.

It gave the impression to the public, wrongfully, that the Company was a law violator, as the unfair question of a witness, "when did you stop beating your wife?"

The order required the Company to reinstate all four without prejudice. Van Horn was then working for the Company and the testimony taken at the hearing established he had been re-employed. The other three declined re-employment, and had been otherwise re-employed by others. Two employees actually profited

by their change of employment, as we pointed out in the motion for re-hearing.

The discharge of the men themselves was not an unfair labor act. Union membership alone is not a guarantee of employment.

The Government contends it was the "motive" of the company to be unfair toward men that belonged to a union.

This "motive" was evidenced, it is charged, by acts of Quisenberry during the first few weeks of the Company's operation; that these unfair labor acts, therefore, denied the Company the right to discharge for cause.

In the case of *N. L. R. B. v. Hinde Dutch Paper Co.*, 171 Fed. (2) 240, in denying enforcement based on a foreman's interrogation of an employee as to how he intended to vote, with a threat the owner would close if the plant were organized, the Court stated:

"When not made in the exercise of authority, but in personal conversations, they do not appear to be the sentiments of the employer or his acts, and to make them such the circumstances ought to show some encouragement or ratification of such repetition as to justify the inference of a policy which they express."

The Board's conclusion from its findings that there was an illegal "motive" is an assumption.

Webster's International Dictionary, 2nd Ed., describes an assumption as something taken for granted, without proof, for the purpose of argument.

The facts in the instant case are not in dispute, the men were discharged for cause. It has been found that

because an employee had an "antipathy" to union men, ergo the Company's motive was illegal, and it is an unfair labor practice for a Company that harbors such an employee to discharge, with or without cause.

Judge Hutcheson, of the Fifth Circuit, in the case of *N. L. R. B. v. Fulton Bag and Cotton Mills*, 175 Fed. (2) 675, had a similar situation, involving "motive", and in denying an order of back pay, observed:

"Unlike many of these cases, however, where the evidence is in conflict, the record here presents little conflict as to the facts, and the report deals not with resolving conflicts in testimony but with assigning motives and reasons for actions taken on facts as to which there is no substantial conflict"

HARRY ALMADA

Under the heading "The discharge of Almada", the Trial Examiner, (R.82-83) in his Report and Recommendation, makes the following finding:

"The second fact, of greater weight, which is not disputed, is that Almada violated the company rule as to bumping tires, burned up a tire on the road, and endangered \$30,000.00 worth of the company's equipment.

It is likewise undisputed that after Quisenberry saw how badly the tire was burned, and learned that it had been left on the desert, because it was too hot for the tire rack of the truck, that he phoned Almada and discharged him.

On all the evidence in the case, I find that this tire was burned and the equipment endangered because Almada had not bumped his tires as required by the company rules. I find that the positive proof that the tire was burned, coupled with Quisenberry's testi-

mony on this point which I credit, outweighs the inference arising from Quisenberry's anti-union conduct.

I find therefore that Almada was discharged for cause''.

A review of the record itself will disclose that by driving on flat tires the heat generated results in fire that, unless detected, destroys vehicles carrying volatile, or explosive gasoline. It was further established that the practice of testing the tire pressure by bumping, as it is called, at regular intervals measured by distance traveled, avoids this hazard. We will point out there was such a rule, an understanding with Almada, specifically fixing not only the distance but the place for bumping; that Almada so acknowledges, and admits he violated, that rule and understanding; that a fire resulted, destroying the tire, endangering the equipment, following his violation of the rule, resulting in his discharge.

Almada testified (R. 147)

Q. "Just answer my question. Did Mr. Quisenberry ever instruct you to bump tires?

A. "He said to bump the tires every 60 miles.

(R. 155) He further testified:

Q. "Did you ever get any printed instructions from Mr. Quisenberry on the length of time which tires should be bumped?

A. "No, not exactly. We talked about that but I, myself, suggested that we check our tires at Deming and Las Cruces, and he said that would be all right."

Query: Was there a breach, or violation of this rule or agreement?

Answer: See testimony (R. 147-148) Almada testifying:

Q. "How far out of Deming, New Mexico, were you at the time you stopped and bumped them?"

A. "I would say 15, 16, 17 miles this side of Las Cruces *when the tire went down.*"

Beginning his trip to Lordsburg, driving east toward El Paso, Almada passed Deming, 60 miles east of Lordsburg, the place agreed upon as the distance and place for bumping, without observing the rule and the understanding. Almada continued on and did not bump at 80 miles, which the General Counsel insists was the rule. The testimony shows he continued on until fire resulted, a distance of approximately 16 miles east of Las Cruces or 102 miles distant from the starting point.

We submit the premises upon which the Board predicated its judgment, that no rule of the Company was violated, giving grounds for dismissal, is repudiated by Almada himself.

Although the Board found the rule had not been violated, and that there was no rule, the reasoning following this finding is rather inconsistent for the Board immediately finds that such a rule would be unnecessary anyway because the risk is one the Company should bear as a "business hazard".

By suggesting that the Company should not discharge an employee for violating a rule because it was a "business hazard" to destroy Company equipment on

the highway overlooks entirely that the burning of a gasoline truck not only destroys the Company property, but imperils and endangers the driver himself, and the public safety, and destruction of property upon and adjacent to the highway itself.

Quisenberry does not ride with drivers. He is not able to check whether there is a violation of a rule until trouble results. Naturally, the doubt arises in the Supervisor's mind, how many times has Almada violated the rule. Accidents do not occur every time he fails to bump the tire at 60 miles. If he is driving every day from Lordsburg through Deming to Las Cruces without bumping tires, there is no way of knowing until the tire burns. The driver was caught this time. There is no way of knowing the number of other times that this and other drivers flaunted the rule of the Company. There is no way the Company has to enforce its rules, involving safety to property and persons, that impresses the drivers as much as discharge. The drivers knew Almada was so discharged.

The Labor-Management Act does not empower the Board to substitute its judgment as to whether loss suffered by acts of an employee for violating a rule should be borne by the Company as a "business hazard". In ruling that the Company should bear the loss as a business hazard, rather than discharge an employee for destroying its equipment in violation of its rules, the Board has entered the field of management.

In order to discredit Almada's testimony that his instructions were to bump the tires at 60 miles, and at Deming in accordance with his own suggestion, the Board's counsel offered in evidence a blank form of rules, on which someone had inserted with a penciled

notation the figure "80" as the distance at which the tires should be bumped.

Almada, himself, denied that any such rule had ever been shown or given him. (See testimony *supra*).

At pages (R.273-274), the Board's counsel offered in testimony Exhibit No. 3. It will be observed from an examination that there has been inserted the figure "80" as the distance which tires were to be bumped. This was identified by Mr. Quisenberry as a form used by the Company but denied that there had ever been any issued with the figure 80 inserted. There was no further identification, no evidence it had ever been issued, or seen by any driver, or relied upon. The counsel did not say where he obtained such an exhibit, who furnished it to him, and where the figure "80" came from. A reading of the testimony in connection with the counsel's offer will disclose that it was repudiated and, notwithstanding it was not verified, counsel placed it in the record, and this false statement has been seized upon, and stated in the opinion of the Board, as evidence that Almada was not to bump the tires except every 80 miles. The exhibit was identified because Quisenberry's signature was written thereon, and Quisenberry admitted his signature, but denied placing "80", or having authorized its insertion.

The opinion, therefore, prepared for the Board's signature containing the statement, or finding of fact, that:

"Almada's conduct conformed to a set of rules issued over Quisenberry's signature, stating in part, 'Drivers will bump tires at least every "80" miles' "

is not supported by any evidence in the record. Quisenberry identified his signature on a set of rules, but denied that he inserted or caused to be inserted the figure "80".

Furthermore, it is not true that Almada bumped the tires at 80 miles. Almada testified he was within 16 miles of Las Cruces when the tire caught fire. This is 102 miles from Lordsburg, and had not been bumped at 80 miles as the opinion states.

There is no evidence that the Company ever issued rules that the tires be bumped every "80" miles. The sworn testimony is that 80 miles was not a Company rule. Almada himself acknowledges the rule to be 60 and the place Deming, N.M.

The opinion is inconsistent in first saying there was no rule violated, and then suggesting an excuse for violating the rule by stating Almada was attempting to make up for lost time. If there had been no violation, why was it necessary to ignore the rule by making up for lost time. Fast driving to make up for a late start makes bumping more necessary and important at the regulated distances. Rules are made for employees without judgment or discretion. A driver, exercising good judgment, would know, without rules, that fast driving to make up for lost time requires bumping at regular intervals, not exceeding 50 or 60 miles, on heavy gasoline trucks.

Section 10 (b) of the Act, relating to competent evidence, limits the introduction to the rules prevailing in the District Court. Notwithstanding the denial by Quisenberry that the figure 80 was in any rules promulgated, the Board has found, contrary to the evi-

dence, that 80 was the Company rule. There is no evidence, no testimony of any witness that 80 miles was ever promulgated, and we defy Government counsel to point to any testimony in this record of such a supporting statement.

As a further argument, advanced in the Board's opinion, as to why the Examiner's report should be repudiated, and the integrity of the Company's motive in discharging Almada challenged, it is suggested that another employee, Wallsmith, had been guilty of burning tires twice previously, and had not been discharged for his acts. Therefore, to discharge Almada for burning a tire at his first act simply showed an ulterior motive on the part of the Company, especially because Wallsmith was not a member of the union.

The question might be asked, was Wallsmith's tire burned within the first 60 miles and before he negligently failed to bump the tire. Or was it burned by reason of failure to bump the tires. An examination of the testimony itself will be the best answer. We, therefore, quote it in full, as follows:

Mr. Langmade: I call Mr. Wallsmith. (R.309-310-311). x x x x

DIRECT EXAMINATION

TRIAL EXAMINER DOYLE: Have a chair and give your full name and address.

The WITNESS: George W. Wallsmith, Berino, New Mexico.

Q. (By Mr. Langmade) And by whom are you employed, Mr. Wallsmith?

A. Texas Independent Oil Company.

Q. When did you first go to work for them?

A. First engaged in labor around the 3rd or 4th of April.

Q. In other words, you were one of the original employees?

A. Yes, sir.

Q. Are you still employed there?

A. Yes, sir.

Q. What is your occupation with them, what do you do?

A. I am a truck driver.

Q. Have you carried out the instructions of Mr. Quisenberry in El Paso or been around him in the conversations with the men a considerable amount of the time?

A. A few times, yes, sir.

Q. Has he ever interrogated you as to your union affiliateship or whether or not you belonged to the union?

A. No, sir, he has not.

Q. When you were employed were you given any instructions as to speed?

A. Yes, sir.

Q. What were they and by whom were they given?

A. At that time the speed was 55 miles per hour.

Q. Who told you that?

- A. Mr. Quisenberry.
- Q. And what about the bumping of tires?
- A. Well, he could have told me that, but it is understood that you bump them.
- Q. What is your understanding?
- A. Well, I have always tried to bump my tires every 50 or 60 miles.
- Q. How long have you been engaged in truck driving?
- A. Well, that is all I have practically done since 1933, I guess, when I first started.
- Q. And what is the general practice about bumping tires?
- A. I would say 50 to 60 miles.
- Q. Did you ever burn up a tire in your experience?
- A. Oh, yes, sir.
- Q. And did you ever lose your employment on account of burning up a tire?
- A. No, but I should have.
- Q. I didn't quite hear your answer?
- A. I didn't, but I should have.
- Q. Why do you say you should have?
- A. Well, there was not too much excuse to burn up the tire.
- Q. And did you see this particular tire that was on Mr. Almada's truck?

A. No, sir.

Mr. Langmade: I believe that is all.

CROSS-EXAMINATION

By Mr. Schoolfield:

Q. How many tires have you burned up in your career as a truck driver?

A. Oh, a couple.

Q. At least a couple?

A. Yes, sir.

Q. Any more than that?

A. Not that I remember.

Q. And you were not discharged for that, is that correct?

A. That is right.

Mr. Schoolfield: I pass the witness.

TRIAL EXAMINER DOYLE: Mr. Wallsmith, are you a member of the union?

THE WITNESS: No, sir.

An impartial, and fair appraisal of the above testimony, by an unprejudiced person, it seems to us does not justify that Wallsmith had been guilty of burning two tires while employed by Texas Independent, and that Texas Independent failed to discharge him because he did not belong to a union. The Examiner did not find that Wallsmith had burned two tires while employed by the respondent.

During his whole career as truck driver, in over twenty years, he had burned two tires, not while he had been employed by Texas Independent.

Because the Board placed so much emphasis on this phase of the testimony, and referred to it so many times as the one thing that influenced the reversal of the Examiner, we submitted a Motion for Rehearing, Exhibit C, and an affidavit of Wallsmith, to which reference is made, stating that the Texas Independent knew nothing when it employed him about his having burned tires.

KENNETH VAN HORN

Van Horn had worked for the Company 10 days when he was let go for failure to report to work. (R.259-260-261). All employees were on a probationary period of 30 to 40 days, and all were so advised when employed. (R.251). Van Horn was back working for the Company before any complaint was filed as to his discharge. He was working for the Company when the trial, or hearing was had in Tucson. (R. 261).

The complaint of unfair labor practices was filed by the Union after Van Horn had been discharged. He was not included in the complaint as having been discharged without cause. The complaint named only four employees. At the trial Van Horn's name was moved by the Government Counsel as a complaining witness, and the Company had made no preparation to produce evidence or testimony as to his employment. All of the statements made by Van Horn about meeting some stranger in Chandler, that told what the President of the Company said, was all hearsay evidence, based on pure fiction, and came as a complete surprise to the

Company, wholly unprepared to meet. Therefore, the motion for re-hearing was filed which included the President's affidavit, to which we now refer. The Board refused to consider, and accepted evidence not admissible in a Court of law.

Van Horn's testimony, (R.190) it will be noted is what someone said to him, or what Quisenberry said to him about what someone else said. The man that told him was not under oath at the time he told him, and we submit is not competent evidence to establish a company statement or motive. It was a self-serving declaration, pure and simple, and is not evidence of either union activities on his part, or that it was coercion on the part of the Company restraining him from anything.

He admits the boss had to call him to get him to work. (R.201).

The statement on page 13 of Counsel's Brief, that Quisenberry admitted that Steele had ordered his dismissal, is not supported by evidence. Quisenberry did not so admit. It will be noted counsel does not refer to the Reporter's Transcript in support of such a statement. We respectfully refer to Quisenberry's testimony. A statement by Quisenberry that Van Horn got a "chicken deal" is not a statement that Steele ordered his dismissal.

It was Van Horn that said that Quisenberry made an admission not an admission made by Quisenberry testimony. One is a self-serving declaration, and should be distinguished from an admission.

Van Horn's discussion with some "old man" at Blakely's near Chandler was observed by Quisenberry

personally, (R.286) who was in the station at the time Van Horn was dumping the load of gasoline.

At the time of his discharge, Van Horn had earned and been paid for his 10 days labor the sum of \$99.36.

The back pay awarded him by the Board's Order amounts to \$1,259.62.

E. W. RITCHINS, JR.

Ritchins was discharged for stripping the gears of heavy deisel equipment. It developed he had never driven heavy equipment, was inexperienced in handling multiple gears, resulting in heavy damage to the Company's trucks.

He was discharged during the probationary period of employment. He had been employed April 28 and was discharged May 25.

Ritchins admitted in his own testimony: (R.160)

Q. Now did you have any discussion about the union with Mr. Quisenberry from the day (employed) until the day you were discharged, that you can recall?

A. Not involving me, not that I can recall.
(R.162-163)

Q. Did Mr. Quisenberry ever give you a reason for discharging you?

A. Yes, he told me—I had transmission failure about 45 miles east of Lordsburg, and it was due to that failure for them laying me off.

Quisenberry fully explains the reason for the discharge as incompetence. (R.254-255-256).

Ritchins' damage to the truck cost the Company \$546.47.⁽ⁱ⁾

Ritchins actually received \$398.33 more during the period he was discharged and for which back pay has been allowed.⁽ⁱ⁾

Add the amount of back pay awarded by this action, amounting to \$840.46 to the \$398.33, and it will be observed that Ritchins has a net profit of \$1,238.79.

(i) See Motion for Rehearing

JOHN E. COX

John Cox was discharged May 15 for speeding. (R.256-259). Trucks are equipped with a chart showing the revolution per minute and the resulting speed.

Although the Examiner does not question the fact that Cox did violate the speed instructions, the ground upon which he found the Company liable for an unfair labor practice, (R.67), is because Quisenberry asked Cox if he was keeping up his union book.

There was a further finding by the Examiner that up until May 15 (R. 37) there was no organizational activity on the part of the union.

The conclusion was reached, therefore, because Quisenberry asked if he was keeping up his dues, it was an unfair labor practice and therefore he could not be discharged for speeding. This inquiry by Quisenberry constituted, in the opinion of the Examiner, "union and concerted activities" and that the speeding was not "the compelling reason."

There was a further finding by the Examiner that the testimony of Cox could not be relied upon. (R.72).

Cox had lost no pay after his discharge. He had, in fact, exceeded the amount of money he would have earned had he continued in the employment of the Respondent by \$481.13.⁽ⁱ⁾

Add to this the amount awarded him by the Board of \$238.90, Cox actually benefited financially in the amount of \$720.03.

The Substantial Evidence Rule

We submit that the substantial evidence rule does not apply in the instant case.

The General Counsel submits his case upon the proposition that the record establishes that Quisenberry's acts the first few weeks of the Company's operations constitute unfair labor practice.

The Government devoted its entire record to establishing an unfair labor practice committed by Quisenberry.

There is respectable authority that these acts did not constitute unfair labor practice for the reason that Section 8 (c) of the Act provides that expressions of views, arguments, or opinions, written, printed or otherwise expressed, shall not be construed as unfair labor practice.⁽ⁱ⁾

Conceding, however, for the moment that there is substantial evidence to support a finding that Quisenberry's acts constituted unfair labor practice, there is no finding that there was not cause for discharge, or

(i) See Motion for Rehearing.

(i) We invite attention to decision under subject of "Authorities".

that the cause in itself was not sufficient to warrant a discharge.

Company's Defense

After the charges were filed, and before the hearing commenced, the Company's attorney propounded the legal proposition (R.120), that although there be a finding of wrongdoing on the part of an employee, that constituted an unfair labor practice, does it follow that an employee could not thereafter be discharged for cause.

The Examiner accepted this as the legal proposition, and the hearing was thereafter conducted upon this premise.

The Company, by its answer (R.112) filed in this Court, again put in issue the same legal proposition.

The Act itself provides that no back pay shall be awarded when an employee is suspended or discharged for cause, and back pay is the only question involved in this appeal.

There is no substantial evidence that the Company had any knowledge of Quisenberry's acts that constituted a violation of the Labor Act. There is no evidence of any history of anti-union practices. There is no evidence of any Company policy, or that Quisenberry's 'antipathy' was known to the Company.

On the other hand, there is evidence that the Company put an immediate stop to the practices complained of when brought to the attention of the Company. The acts took place some two hundred miles from the Com-

pany's offices, and during the first six weeks of the Company's operations.

It may be true the Court accepts the "findings" of the Board on appeal, but there is a distinction between a "finding" and a conclusion. If the Courts are bound by the conclusions as well as the findings, there would be no purpose in an appeal or review by the Courts.

The conclusion, in the instant case, by the Board is that an employee who committed an unfair labor act, and there being substantial evidence in support of that, any cause for discharge that may thereafter arise is unworthy of consideration, and no findings as to their existence or non-existence is necessary.

We submit there is no substantial evidence that cause did not exist for the discharge of the employees, and that under the Act "no order of the Board shall require back pay".

Respectfully submitted.

LANGMADE AND SULLIVAN,
By *Stephen W. Langmade*,
Attorneys for Respondent,
303 Phoenix National Bank Building
Phoenix, Arizona.

June 15, 1955

APPENDIX

AUTHORITIES

In the case of *Sax, (d.b.a. Container Mfg. Co.) v. N. L. R. B.*: 171 Fed. (2) 769; Judge Minton (now Supreme Court Justice) speaking for the Circuit Court of Appeals, stated:

“Mere words of interrogation or perfunctory remarks not threatening or intimidating in themselves made by an employer with no anti-union background, and not associated as a part of a pattern or course of conduct x x x cannot support a finding of a violation of Sec. 8 (1).”

Wayside Press Inc., v. N. L. R. B., decided by Judge Denman, 9th Circuit, August 3, 1953, stated:

“Use of employment application blank whether applicant is a union member is not a violation of 8 (a)

(1) there being no showing of restraint or coercion.”

In an opinion by the Board, reported in 24 L. R. R. M. 1377, in the case of *Chance Voight Aircraft v. N. L. R. B.*, it was stated:

“Speeches made by employer’s personnel supervisor to employees in which he stated the employer would prefer operating without a union for a year, and mentioned the benefits the employer had already given the employees, were privileged under Sec. (8) (c) as they did not contain a promise or threat of reprisal.”

Isolated statements by Superintendent, not coupled with threats or coercion, that no union would exist where Superintendent worked, not evidence of coercion, citing:

114 F (2) 624 Martel Mills

116 F (2) 388 E. I. du Pont

119 F (2) 631 Quaker State Oil

120 F (2) 913 Wilson & Co.

Court denied petition for enforcement:

Held discharge of employee was not discriminatory, stating:

“It is the established rule that the employer may hire and fire at will so long as the action is not based upon opposition to union activities”; citing:

Jones and Laughlin Steel Co. 57 Sp Ct 615

Phelps Dodge 61 Sp Ct 845

Blue Bell-globe Mfg. 120 Fed. (2) 974

American Smelting 126 F (2) 680

Montgomery Ward 157 F (2) 486

N. L. R. B. v. Enid Co-Operative Creamery, 169 Fed. (2) 986.

Court denied petition for enforcement.

Board relied upon a course of conduct, and statements made by supervisory employees during a union's campaign to organize.

“The statements were made to various employees at their homes, on the street, or wherever they happened to meet. They were undoubtedly calculated to persuade the employees not to join the union. Thus they were told they would derive no benefit from joining

the union; that the wages were higher than the wages in similar plants, and that if the employees were unionized they might have to take a reduction in salary; that if they joined a union and failed to pay their dues they would be discharged, and other 'disadvantages' of union membership were pointed out.

But there is no evidence of any direct or subtle threats of coercion. No one was led to believe that membership in the union would affect his employment in any way, and there is no evidence whatsoever that membership in the union or membership activities prejudiced any employee."

"The Act prescribes interference, restraint and coercion—it does not prescribe 'free trade of ideas' (authorities). The Board has a wide latitude in appraising facts and drawing inferences therefrom. It has the primary responsibility for the administration of the Act and, to that end, the right and duty to determine when facts constitute unfair labor practices. But we, along with the Board, have the duty to balance the employer's inalienable right of free speech and expression against the employees too freedom of self-organization."

See also:

Blue Flash Express, Inc., 109 N.L.R.B. No. 85, holding that interrogation, not tending to restrain, is not an unfair labor practice.

No. 14680

**In the United States Court of Appeals
for the Ninth Circuit**

National Labor Relations Board,

Petitioner

vs.

Texas Independent Oil Company, Inc.,

Respondent

PETITION FOR REHEARING

LANGMADE and SULLIVAN
Attorneys for Respondent



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Respondent

CERTIFICATE OF SERVICE

The undersigned certifies that three copies of the Petition for Rehearing were this day served by first class mail on the following counsel at the addresses listed below:

Allen P. Schoolfield, Jr.,
300 West Vickery
Fort Worth, Texas

Marcel Mallet-Prevost
National Labor Relations Board
Washington, D. C.

Dated at Phoenix, Arizona, this 5th day of May, 1956.

Stephen W. Langmade
of Attorneys for Respondent
303 Phoenix National Bank Building
Phoenix, Arizona

**In the United States Court of Appeals
for the Ninth Circuit**

No. 14680

National Labor Relations Board,

Petitioner

vs.

Texas Independent Oil Company, Inc.,

Respondent

PETITION FOR REHEARING

COMES NOW Texas Independent Oil Company, Inc., by its attorneys, Langmade and Sullivan, and moves for rehearing and petitions for a modification of the order directing the enforcement of the National Labor Relations Board order in the above entitled cause, first, in approving the award of back pay to Harry M. Almada, and, second, the award to E. W. Ritchins, Jr., and John E. Cox should be reduced by the amount of their earnings during the period of their suspension.

Grounds for Rehearing

In the matter of Harry M. Almada, we submit, as grounds for rehearing, the rules stated by Justice Frankfurter as to the meaning of "substantial evidence" where there is a difference of opinion between the conclusion of the Examiner, and the Board. The conclusion of the Examiner, when the evidence is re-

viewed by the Court, requires "less substantial" evidence, as the Justice expressed the rule, to sustain the findings of the Examiner. *Universal Camera Corp. v. National Labor Relations Board*, 71 Sp. Ct. Rep. 456.

In the matter of the award to E. W. Ritchins, Jr., and John E. Cox, we submit, as grounds for rehearing, the rule as stated by Justice Minton in *N.L.R.B. v. Gullett Gin Co.*, 71 Sp. Ct. Rep. 337, requiring the award to be reduced by the amount earned in other employment (except unemployment insurance payments) during the period of suspension.

Argument

HARRY M. ALMADA

In the case of Almada the Court found no error in the Board's conclusion because there appeared substantial evidence in support of "either the Examiner's or the Board's conclusion" and "not arising from credibility of witnesses". Therefore, concluded the Court, "the Board was free to draw its own conclusions".

In other words, it was not error for the Board to arrive at a different conclusion than the Examiner when the evidence was in balance.

In Almada's case, says the opinion, while the Examiner finds Almada was discharged for cause, the Board finds the cause a mere pretext because Almada exercised his right to join and assist the union.

The Board was sustained because the weight of the evidence, and the credibility of the witnesses, supported the Examiner equally with the conclusion of the Board and, therefore, the Board was sustained.

In the *Universal Camera* case, (supra) Justice Frankfurter ruled the Courts must assume a greater responsibility in reviewing labor cases for the reasonableness and fairness of the Board's decisions, and reversed Judge Hand, of the 2nd Circuit, because he failed to give credence to the Examiner's findings.

We desire to point out and compare the evidence supporting the Examiner with that supporting the Board, and request the Court to review the same, bearing in mind the rules outlined by Justice Frankfurter as a guide as to the reasonableness of the sustaining evidence.

Justice Frankfurter insists there is a duty on the Courts to review the evidence and arrive at an independent judgment. In the instant case, after reviewing the evidence, the independent conclusion reached by the Court was, all things being equal, "the Board was free to draw its own conclusions".

Before reviewing the evidence in the record, however, we wish to suggest the burden of proof is always upon the party alleging wrongdoing and, a finding by the Court that the substantial evidence is equally favorable, the complainant has not sustained the burden of proof. There is no presumption in this instance that aids one who has the burden of proof. There is no presumption that one acts illegally or unlawfully. Rather, the presumption is that all acts are done in good faith and, when there is conflicting presumptions, the presumption that one conformed to the law prevails over a presumption he acted illegally.

The Court cites, as authority for disagreeing with the respondent's proposition, that although an unfair

labor practice had been committed this did not grant immunity to an employee from being discharged for cause, the case of *Wells Inc. v. N.L.R.B.* (9th Cir) 162 Fed (2) 457.

In the *Wells* case the Court stated:

“The existence of some justifiable ground for discharge is no defense if it was not the moving cause.”

We do suggest, however sound the rule, it is not applicable to the facts presented in the Almada cause. In the *Wells* case, the Court stated the ground for removal was not told to the employee at the time he was discharged. The Court then observed that, if he had been told the reason for his discharge at the time. “**HIS DISCHARGE WAS NOT ONLY WARRANTED BUT OBLIGATORY**”.

Almada was told the reason for his dismissal at the time of his discharge (AR143). If the Court applied the rule in the instant case, that was applied in the *Wells* case, enforcement would have been denied. Enforcement was denied in the *Wells* case and the Board was reversed. No back pay was awarded in the *Wells* case and the order for reinstatement ordered by the Board was reversed.

The abstract proposition of law, quoted from the *Wells* case as authority in the instant case, in its application to the facts in the instant case, and as applied by the Court in the *Wells* case, supports the proposition advanced by this respondent.

In the *Universal Camera* case (*supra*) the Examiner had held the discharge was justified. Judge Hand of

the 2nd Circuit, after the Board had reversed the Examiner and applied for enforcement, upheld the Board ordering reinstatement of the discharged employee.

We believe it is significant that certiorari was granted to weigh the evidence, in view of the rule that the Supreme Court will not entertain appeals to settle N.L.R.B. controversies involving only the weight of evidence. It must have become apparent to the Supreme Court that the Courts were disregarding the purpose and responsibility Congress intended the Courts to assume in reviewing the evidence and weighing the findings and conclusions of the Examiner, when reversed by the Board, and as Justice Frankfurter observed:

“ * * * the requirement for canvassing ‘the whole record’ in order to ascertain in substantiality does not furnish a calculus of value by which a reviewing court can assess the evidence.”

* * *

“The legislative history of these acts demonstrates a purpose to impose on courts a responsibility which has not always been recognized.”

* * *

“(5) We conclude, therefore, * * * that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past * * * The Board’s findings are entitled to respect; but they must nonetheless be set aside when the record before a court of appeals clearly precludes the Board’s decision from being justified by a fair estimate of the worth of the testimony of the witnesses or its informed judgment on matters within its special competence or both.”

Justice Frankfurter also remarked, in weighing the evidence, that the Examiner, who was present, heard the

witnesses, who had lived with the case and drawn conclusions different from the Board, was entitled to more credit; as Justice Frankfurter expressed it, the evidence "may be less substantial in support of the Examiner".

If "less substantial evidence" justifies upholding an Examiner, certainly when the substantial evidence is equal the Examiner's conclusions are entitled to the rule that the complainants have not sustained the burden of proof.

With the legal principles outlined by Justice Frankfurter in the *Universal Camera* case as a guide, we would like to compare the "substantial evidence", as found by the Examiner, with the "substantial evidence" found by the Board, which the Court, in its opinion in the instant case, says is equal. Please observe in comparing the reasonableness of the two findings that the Examiner states facts while the Board confuses facts with opinions. The Examiner stated, (AR 82-83):

"Almada violated the company rule as to bumping tires, burned up a tire on the road, and endangered \$30,000 worth of the company's equipment. It is likewise undisputed that after Quisenberry saw how badly the tire was burned, and learned it had been left on the desert because it was too hot for the tire rack of the truck, that he phoned Almada and discharged him."

"On all the evidence in this case, I find that this tire was burned and the equipment endangered because Almada had not bumped his tires as required by the company rules. I find that the positive proof that the tire was burned, coupled with Quisenberry's testimony on this point which I credit, outweighs the inference from Quisenberry's anti-union conduct. I

find, therefore, that Almada was discharged for cause.”

The Board found: (AR 101)

“We are unable to agree with the Trial Examiner that Almada was discharged for cause. Almada had not violated the respondent’s rule about bumping tires. Moreover, the evidence shows that the burning of a tire is an occasional business hazard and did not deter the respondent from replacing Almada with a non-union driver who had previously burned tires on at least two occasions. In view of the respondent’s other unlawful conduct, we accordingly find that the respondent’s manager, Quisenberry, discharged Almada for exercising his protected right to join and assist the union.”

The Board’s statement that Almada did not violate the company’s rule is not supported by the evidence. Almada admitted the rule himself. This statement, therefore, is untrue. The Board’s statement that the “evidence” shows the burning of a tire is a business hazard is also untrue. There is no “evidence” in the record stating it a business hazard. The first time the expression was used was by the Board in expressing its opinion. The Board’s statement that a non-union man was used to replace Almada was true but a finding he had not been discharged by the respondent although he had burned two tires is not true. The tires were not burned when he worked for respondent. The Board set forth four findings (AR 101), quoted in full above, for its conclusions. In support of the first finding, the rule about bumping tires, we invite the Court’s attention to the evidence in the record. Almada testified (AR 147) (149):

“He (meaning Quisenberry) said to bump the tires every 60 miles.”

“Then you hadn’t bumped your tires for a period of approximately 80 miles?”

“No, I hadn’t.”

Although the Board found a rule had not been violated, the witness himself so admitted, and we ask, does the record support the Board or the Examiner, and is a witness bound by his own admissions?

In support of the finding that the “evidence showed” the burning of a tire to be a business hazard, we have searched the record and find there is no evidence or suggestion by any witness that the burning of a tire is a business hazard. We suggest this finding is not supported by evidence.

The next “finding” by the Board that Wallsmith, a non-union man, who had not been discharged for burning two tires, was used to replace Almada who had burned only one. We set forth the entire Wallsmith testimony in our response, which we again invite the Court to read, to establish that only part of the finding is true. Wallsmith was non-union, which he admitted. His statement was filed with the Board, on a petition for rehearing, that the respondent had no knowledge of his having burned two tires. The evidence shows Wallsmith, in his twenty years labor as a truck driver before working for the respondent, had burned only two tires, which he admitted was cause for discharge. Evidence of which the respondent had no knowledge certainly does not establish an ulterior motive. The respondent had no knowledge of two tires having been

burned; Wallsmith certainly had not burned two tires while in the employ of the respondent, and the record has no evidence that two tires were burned by Wallsmith while in respondent's service.

The fourth and last ground charged by the Board as the "moving cause" for discharge was the "respondent's other unlawful conduct".

The Examiner found (AR 152) that Almada was duly notified at the time he was discharged and given the reason for his suspension:

"He called Almada before he made his next run and said 'Harry I'm going to have to let you go because of that tire'. Almada said, 'I take it I'm fired for union activities'. He said, 'No, Harry, you are fired because you burned up a tire and left it lay beside the road because it was so damn hot you couldn't get it back on the tire rack.'"

This statement made to Almada at the time of his discharge removes the unlawful conduct charge referred to by the Court in the Wells case (*supra*). There the employee was not given the reason for his discharge at the time of suspension. The Court found in that case if the reason for discharge has been told the employee at the time, the discharge would have been warranted.

The other "unlawful conduct", referred to by the Board as the moving cause for Almada's discharge, consists, of course, of what the Board considers "unfair labor practices" by Quisenberry. In support of our legal proposition that, when grounds for discharge exist, activities protected by Section 7 of the Act will not insulate an employee from being discharged for cause,

we invite the Court's attention to the rules adopted by a few of the many Circuit Court opinions, as follows:

National Labor Rel. Bd. v. Huber & Huber Motor Exp., 223 Fed. Rep. (2d); 748.

Where a legal ground for discharge existed—as it did in this case—and the employee was discharged on that ground alone, obnoxious conduct on his part, in an activity protected by Section 7 of the Act, will not insulate him from being discharged on such legal ground.

Considered as a whole, the record in this case does not support the Board's petition for a decree for enforcement and accordingly the petition is denied.

National Labor Rel. Bd. v. Houston Chronicle Pub. Co., 211 F. 2d 848, at 854, 855.

When the Board could as reasonably infer a proper motive as an unlawful one, substantial evidence has not proved the respondent to be guilty of an unfair labor practice. Motives are notoriously susceptible of being misunderstood and hard to prove or to disprove. If an ordinary act of business management can be set aside by the Board as being improperly motivated, then indeed our system of free enterprise, the only system under which either labor or management would have any rights, is on its way out, unless the Board's action is scrupulously restricted to cases where its findings are supported by substantial evidence, that is evidence possessed of genuine substance. In our opinion this is not such a case.

National Labor Rel. Bd. v. American Thread Co. 210, F. 2d 381, at 383.

(1) Specifically we are in no doubt that the evidence completely fails to support the finding that

William Robinson was discharged because of his membership in, and activity on behalf of, the union. On the contrary, it shows without contradiction or dispute that he was discharged for open and continuous insubordination and disobedience of orders, and the order requiring his reinstatement with back pay is itself an unfair labor practice and as such is prohibited by Section 10(c) of the act which provides, "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged * * * for cause * * *", 29 U.S.C.A. §160 (c).

National Labor Rel. Bd. v. Blue Bell
219 F. 2d, 796, at 798, 799.

(7) Where the employer has proper cause for discharging an employee, the Board may not rely on scant evidence and repeated inferences to make a finding that places the Board in the position of substituting its own ideas of business management for those of the employer. Considered as a whole, the record in this case does not support the Board's petition for a decree of enforcement, and accordingly the petition is denied. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 71 S. Ct. 456, 95 L. Ed. 456.

Enforcement denied.

The interrogation of employees, statements made by supervisors and the threats to close up business, and other unfair labor practices, shown in the above reported cases, did not deny an employer the rights guaranteed by Section 10(c) of the Act.

Almada's complaint as to why he was discriminated against, and that the burning of the tire was merely a pretext for his discharge, is set forth in his direct testimony, AR pages 121 to 155 inc.

It should be noted Quisenberry did not discharge Almada when, over the telephone, Almada first told him he had burned the tire and he expressed the hope it would not get him in trouble, (AR 143). Quisenberry replied he would first look at it and it was only after an examination of the circumstances, and confirming that Almada had violated the rules of the company and endangered the \$30,000 investment of his employer, that he acted. Almada wasn't worrying about being discharged for his union affiliation at the time he reported the burning of the tire. The discharge became discriminatory as an afterthought. The "unlawful" conduct that insulated Almada from being discharged for cause, it is claimed, consisted entirely of conversations had with Quisenberry. First, before he was actually an employee, and before it became unfair to speak, "he questioned me as to whether I belonged to a union." Notwithstanding Almada's reply that he was a union member, he was actually employed and given much greater authority by being authorized to recommend others to be employed. True, Quisenberry told him he didn't want any union trouble (who does) and that he wanted the men to defer organizing until they "got rolling." Almada also said that Quisenberry said that the 'Old Man' said he wouldn't put up with it. After Almada was employed, and when free speech becomes limited, Quisenberry explained to Almada how he had belonged to a union once and he thought it had held him back, and his philosophy about unions, but this conversation contained no threats. There was another conversation, several weeks later and several weeks before he burned the tire, involving a reported statement made by 'The Old Man.' (AR 135). Almada testified that Quisenberry said that the old man said he was mad at him and to get rid of a certain man, meaning

Almada. Someone said that Nixon said that Harry Truman was a traitor, yet Harry Truman was not indicted or convicted. The rules of evidence in a French court might have honored what Almada said that Quisenberry said that Horace Steele said, but the Taft-Hartley Act preserved the rules of evidence observed in the United States District Courts.

Again there was another conversation in which Quisenberry said (AR 136) that Fred Bone, a union man, had said that Almada "was a staunch union supporter, and that I would follow whatever the union told me." This made Almada so mad he called Fred Bone on the telephone and Bone said he never said any such thing. Almada resented, after telling Quisenberry he wouldn't create any disturbance, that Quisenberry would question his integrity, and the whole story falls flat because it is a statement of what Almada said that Quisenberry said that Fred Bone said, that Fred Bone denied.

The above are the principal conversations referred to as unlawful conduct on the part of the respondent in the Almada case. The other conversations related to Ritchins and Cox, that Almada said that Quisenberry said, and were carried on between the two as the usual bickerings between employees, over which the management had no control. Whatever may have been said, or denied to have been said, did not relate to Almada's union activities; in fact, Almada did not instigate, and there is no evidence that he instigated, any union activities. It is not "unlawful conduct" to hold opinions. Much emphasis was placed on the "antipathy" of Quisenberry because of his beliefs. There are many employers that have an "antipathy" against

unions, just as union men have an "antipathy" against management.

As was said by Justice Rives in *N. L. R. B. v. Houston Chronicle* (supra), "if an ordinary act of business management can be set aside by the Board as being improperly motivated, then indeed our system of free enterprise is on its way out." People have not yet been convicted for holding opinions. Anthony Eden, according to the press reports, congratulated himself on a diplomatic victory in his last confab with B & K because they pledged to assist him in securing the release of some two hundred Czechoslovaks imprisoned for their opinions. Perhaps that is what the Court meant in the *Houston Chronicle* case, that we had not yet reached the point where we condemned men for holding opinions, and that all who did not conform were improperly motivated in their dealings with their fellow men.

E. W. RITCHINS, JR., AND JOHN E. COX

The Board did not reduce the earnings of these two employees during the period of their suspension by the amount of their earnings in other employment.

Ritchins earned \$398.33 in other employment in excess of what he would have earned had he worked continuously for the respondent.

Cox earned \$481.13 in other employment in excess of what he would have earned had he worked continuously for the respondent.

We raised this issue before the Board and called it to the Court's attention in our response.

We submit the case should be remanded for the purpose of giving credit to the respondent for the amount earned in accordance with the Act, and as the Supreme Court has interpreted the Act in *N. L. R. B. v. Gullett Gin Co.*, 71 Sp. Ct. Rep. 337.

Respectfully submitted,

LANGMADE and SULLIVAN

By Stephen W. Langmade
Attorneys for Respondent
303 Phoenix National Bank Building
Phoenix, Arizona

Certificate of Merit

In conformity with Rule 23, this is to certify that in my judgment the grounds for rehearing are well founded and declare it is not filed for delay.

DATED at Phoenix, Arizona, this 15th day of May, 1956.

Stephen W. Langmade
of Attorneys for Respondent



No. 14682

**United States
Court of Appeals**
for the Ninth Circuit

MATTIE EDENS MEDIGOVICH,

Appellant.

vs.

PACIFIC MUTUAL LIFE INSURANCE COM-
PANY, a Corporation,

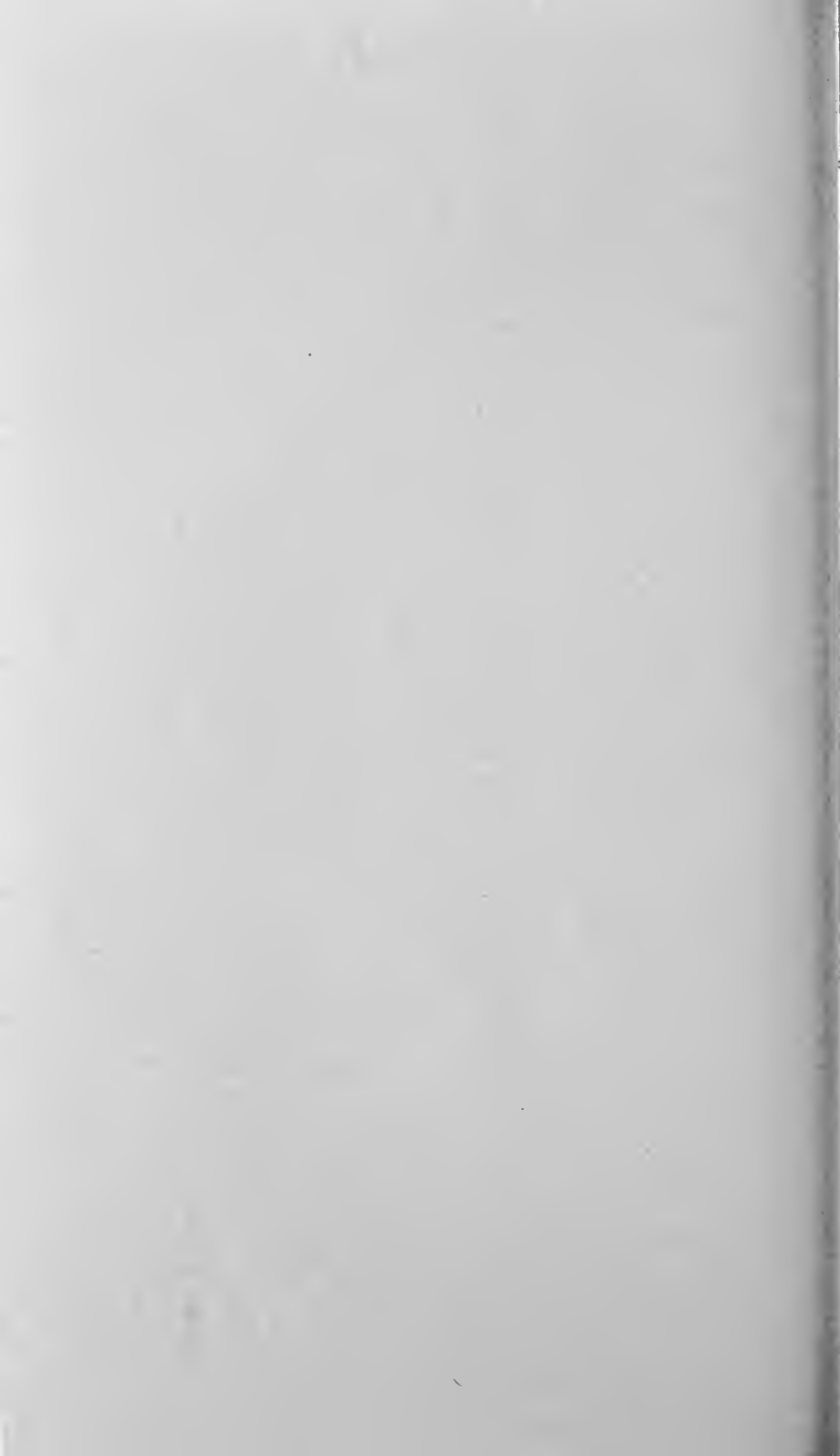
Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Arizona

FILED

MAY -2 1955



No. 14682

**United States
Court of Appeals**
for the Ninth Circuit

MATTIE EDENS MEDIGOVICH,
Appellant.

vs.

PACIFIC MUTUAL LIFE INSURANCE COM-
PANY, a Corporation,
Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Arizona



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States
for the District of Arizona

No. Civ. 384 Pct.

MATTIE EDENS MEDIGOVICH,

Plaintiff,

vs.

PACIFIC MUTUAL LIFE INSURANCE COM-
PANY, a Corporation,

Defendant.

PETITION FOR REMOVAL OF
CIVIL ACTION

To the Honorable the United States District Court
for the District of Arizona:

The petition of defendant, a corporation, herein-
after called "petitioner," respectfully shows:

I.

That this is a civil action brought by Mattie Edens Medigovich, as plaintiff, to recover from petitioner, as defendant, the sum of Five Thousand Dollars (\$5,000.00) alleged to be due under a policy of insurance upon the life of Joan E. Medigovich, all as more particularly appears from the true copy of plaintiff's Complaint filed herewith.

II.

That the amount in controversy at the time of commencement of this action exceeded and now exceeds the sum of Three Thousand Dollars (\$3,000.00), exclusive of interest and costs.

III.

That plaintiff was at the time of commencement of this action, and now is, a citizen and resident of the State of Arizona, and petitioner was at the time of commencement of this action, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of California, and a citizen and resident thereof.

IV.

That the action was commenced by the filing of plaintiff's Complaint in the Superior Court of the State of Arizona, in and for the County of Yavapai, Docket No. 18,800, on the 30th day of July, 1953, all as more particularly appears from the true copy of the Summons filed herewith. Said Summons was served upon petitioner on the 6th day of August, 1953. This petition is filed within twenty (20) days after service of process. Petitioner has not moved, answered, pleaded or otherwise appeared in said Superior Court of Arizona.

V.

That, by reason of the foregoing, this is a civil action of which the district courts of the United States are given original jurisdiction and is removable to this Court.

VI.

That petitioner presents herewith a bond with good and sufficient surety, conditioned that petitioner will pay all costs and disbursements incurred by reason of the removal proceedings should it be

determined that the case was not removable or was improperly removed.

VII.

That upon the filing of this petition and the bond aforesaid, petitioner is giving written notice thereof to all adverse parties and is filing a copy of this petition with the Clerk of the Superior Court of the State of Arizona, in and for the County of Yavapai.

VIII.

That copies of all process, pleadings and orders served upon petitioner in this action are filed herewith.

Wherefore, petitioner prays that this action be removed to this Court and that said Superior Court of Arizona, in and for the County of Yavapai, shall proceed no further unless this case is remanded.

Dated this 20th day of August, 1953.

EVANS, HULL, KITCHEL &
JENCKES,

By /s/ JOS. S. JENCKES, JR.,
Attorneys for Defendant.

State of Arizona,
County of Maricopa—ss.

Joseph S. Jenckes, Jr., being duly sworn, deposes and says that he is one of the attorneys for petitioner, in whose behalf he makes this affidavit, and

that he has read the foregoing petition and that the facts stated therein are true, as he verily believes.

/s/ JOS. S. JENCKES, JR.

Subscribed and sworn to before me this 20th day of August, 1953.

[Seal] /s/ ALICE J. FITCH,
Notary Public.

My commission expires March 4, 1956.

In the Superior Court of the State of Arizona
in and for the County of Yavapai

No. 18,800

MATTIE EDENS MEDIGOVICH,

Plaintiff,

vs.

PACIFIC MUTUAL LIFE INSURANCE COM-
PANY, a Corporation,

Defendant.

COMPLAINT

Plaintiff complains of defendant and for cause of action alleges:

I.

Plaintiff is a resident of Yavapai County, Arizona; defendant is a corporation duly organized and existing, qualified and authorized to do business in

the State of Arizona and doing business in the County of Yavapai, State of Arizona, with an agent therein upon whom service of process may be had.

II.

Heretofore and prior to the 23rd day of January, 1953, defendant herein, Pacific Mutual Life Insurance Company, insured the life of Joan E. Medigovich and agreed to pay, if the said Joan E. Medigovich died during the effective date and term of said policy of insurance the sum of Five Thousand Dollars (\$5,000) to plaintiff herein, Mattie Edens Medigovich, mother of said Joan E. Medigovich; that on the 23rd day of January, 1953, said Joan E. Medigovich died while said policy was in full force and effect.

III.

That plaintiff herein duly prepared and filed her Proof of Death of said Joan E. Medigovich as required by said policy of insurance, but said defendant has failed and refused to pay in accordance with the terms and provisions of its said contract of insurance.

IV.

Wherefore, plaintiff prays judgment against defendant in the sum of \$5,000; with accrued interest; and for such other and further relief as may be proper.

SNELL & WILMER,

By /s/ MARK WILMER,

Attorneys for Plaintiff.

[Title of District Court and Cause.]

NOTICE OF FILING PETITION FOR
REMOVAL OF CIVIL ACTION

To Mattie Edens Medigovich, Plaintiff, and Snell &
Wilmer, Plaintiff's Attorneys:

Please Take Notice that defendant has, on the 20th day of August, 1953, filed in the above-designated court, and in the office of the clerk thereof, its petition and bond for the removal of this action to said court.

Copies of this petition and bond are served upon you herewith.

Dated this 20th day of August, 1953.

EVANS, HULL, KITCHEL &
JENCKES,

By /s/ JOS. S. JENCKES, JR.,
Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed August 20, 1953.

[Title of District Court and Cause.]

ANSWER

Defendant answers Plaintiff's Complaint in the following manner:

I.

Admits Paragraph I of the Complaint.

II.

Admits all of Paragraph II of the Complaint, save and except the allegation that "said Joan E. Medigovich died while said policy was in full force and effect," which allegation defendant specifically denies.

III.

Admits that plaintiff duly filed her proof of death as required by the policy and that defendant has refused to pay to plaintiff the benefits provided for thereunder, and alleges that its refusal was in accordance with the terms and provisions of said policy of insurance, as hereinafter alleged.

IV.

The contract of insurance, referred to in Plaintiff's Complaint, Group Life Certificate No. 266, was issued upon the life of Joan E. Medigovich under and subject to a master Group Life Insurance Policy No. GL-2208. The master policy was issued to a trustee for the Arizona Retail Lumber & Builders Supply Assn., Inc., Trust Fund and undertakes to insure only certain classes of employees of certain subscribing employers. The Cottonwood Lumber Company, a partnership, was a qualified subscribing employer. Under the provisions of the master group policy it is provided that where the subscribing employer is a partnership, the partners thereof shall be considered employees if and while actively engaged in the partnership business. Upon the representation that Joan E.

Medigovich was a partner actively engaged in the partnership business of Cottonwood Lumber Company, the said Joan E. Medigovich was issued Group Life Certificate No. 266.

V.

However, Joan E. Medigovich was not, when said certificate was issued, or at the time of her death, a partner actively engaged in the partnership business, or an employee of the said Cottonwood Lumber Company, and therefore the said Joan E. Medigovich was not qualified or eligible for insurance under the master group policy. By reason thereof, defendant alleges that said insurance on the life of Joan E. Medigovich was never in effect.

VI.

Defendant alleges, in the alternative and in the event the said Joan E. Medigovich was an employee within the meaning of the policy at the time of the issuance of the certificate, that said insurance terminated before her death by reason of her employment having been terminated thirty-one (31) days prior thereto in accordance with the terms of the policy and certificate providing that the insurance of the employee will terminate thirty-one (31) days after termination of employment.

VII.

Defendant alleges that, after proof of death was received by defendant and after it ascertained that said insurance on the life of Joan E. Medigovich was never in effect, a refund of Premiums was

properly tendered by defendant but refused by the plaintiff.

Wherefore, defendant prays that plaintiff take nothing by her Complaint and for such other relief as may be proper in the premises, together with defendant's costs incurred herein.

EVANS, HULL, KITCHEL &
JENCKES,

By /s/ JOS. S. JENCKES, JR.

Receipt of copy acknowledged.

[Endorsed]: Filed August 25, 1953.

In the District Court of the United States
for the District of Arizona

MINUTE ENTRY OF TUESDAY,
DECEMBER 28, 1954

Honorable James A. Walsh, United States District
Judge, Presiding.

[Title of Cause.]

The Court finds that Joan E. Medigovich, deceased, was insured by the defendant in the amount of \$5,000.00 effective July 3, 1952, as a partner actively engaged in the business of Cottonwood Lumber Co., a partnership. The Court finds further, however, that Joan E. Medigovich ceased to be actively engaged in the business of Cottonwood Lumber Co. on or about September 17, 1952, and

that her insurance terminated thirty-one (31) days thereafter, as provided by the terms of Group Policy No. GL-2208 and Certificate No. 266 issued thereunder.

Accordingly, It Is Ordered that the Clerk enter judgment herein in favor of the defendant and against the plaintiff.

(Docketed Dec. 30, 1954.)

In the District Court of the United States
for the District of Arizona

Civ. 384 Prct.

MATTIE EDENS MEDIGOVICH,

Plaintiff,

vs.

PACIFIC MUTUAL LIFE INSURANCE COM-
PANY, a Corporation,

Defendant.

CIVIL DOCKET

Date: 1954.

Filings—Proceedings

* * *

Dec. 30—Enter judgment in favor of the defendant Pacific Mutual Life Insurance Company, a corporation, against the plaintiff Mattie Edens Medigovich, pursuant to order of December 28, 1954.

* * *

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Mattie Edens Medigovich, plaintiff in the above-entitled and numbered cause, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in the above-entitled and numbered cause on the 30th day of December, 1954, in favor of the defendant, Pacific Mutual Life Insurance Company, a corporation, and against the plaintiff, Mattie Edens Medigovich, adjudging that plaintiff, Mattie Edens Medigovich, take nothing by reason of her complaint.

Dated this 25th day of January, 1955.

SNELL & WILMER,

By /s/ MARK WILMER,
Attorneys for Plaintiff-
Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed January 26, 1955.

[Title of District Court and Cause.]

BOND OF COSTS ON APPEAL

Know All Men by These Presents:

That we, Mattie Edens Medigovich as Principal,
and Fidelity and Deposit Company of Maryland,

as Surety, do hereby acknowledge ourselves jointly and severally bound to Pacific Mutual Life Insurance Co., a corp., Defendant, for all costs in above-entitled suit, not to exceed, however, the sum of Two Hundred Fifty & no/100 Dollars.

Conditioned, However, that the said Mattie Edens Medigovich, Plaintiff, will pay all costs that may be adjudged against her in said suit, during its pendency or at the final determination thereof, and judgment for said costs may be entered against us, and each of us, up to the full penalty of this bond, in the final judgment of this cause.

Witness our hands and seals this 4th day of March, A.D. 1955.

/s/ MATTIE EDENS MEDI-
GOVICH.

By SNELL & WILMER,
Attorneys.

FIDELITY AND DEPOSIT
COMPANY OF MARYLAND,

[Seal] By /s/ MARY ARME CARLSON,
Attorney-in-Fact.

THE VALLEY NATIONAL
COMPANY—INSURANCE.

Countersigned by:

/s/ M. A. CARLSON,
Agent.

[Endorsed]: Filed March 4, 1955.

In the District Court of the United States
for the District of Arizona

No. Civil 384—Prescott

MATTIE EDENS MEDIGOVICH,

Plaintiff,

vs.

PACIFIC MUTUAL LIFE INSURANCE COM-
PANY, a Corporation,

Defendant.

PROCEEDINGS

Appearances:

Messrs. Snell & Wilmer, by Mark Wilmer, for
the Plaintiff.

Messrs. Evans, Hull, Kitchell & Jenckes, by Ralph
J. Lester, for the Defendant.

The above-entitled case came on for trial on the
29th day of July, 1954, in the District Court of
the United States for the District of Arizona, at
Prescott, Arizona, before the Honorable James A.
Walsh, Judge, without a jury, and the following
proceedings were had, to wit:

(The following took place in the chambers of
the Court.)

Mr. Wilmer: Prior to March, 1952, the Cotton-
wood Lumber Company consisted of three individ-

uals: Mr. and Mrs. Medigovich, who are the parents of the deceased daughter, and her brother, each owning one-third interest in it as a partnership.

About March, 1952, the brother withdrew from the partnership, that is, Mrs. Medigovich's brother, and the two Medigovich children, Joan, who was then sixteen or seventeen, and Billy, thirteen or fourteen, became members of the partnership. They had previously inherited each \$10,000 from their grandmother, I believe it was, and they purchased the interest of the brother, that is, Mrs. Medigovich's brother, who was withdrawing, and the \$10,000 was actually put into the partnership.

At that time there was a partnership agreement reached, and the attorney in Cottonwood, Mr. Norton, was engaged to prepare it.

Art Brooks of the firm of Marvin Dennis & Company is the accountant who handled it and helped her. Appropriate changes were made in the employment security records, financial statements were prepared at the bank, and income tax returns were prepared, all on a partnership basis. The daughter, Joan, previously had been working in the business to a certain extent, but subsequent to the formation of the partnership assumed further duties, made up bills at the end of the month, waited on the trade and was otherwise active in the scope of her capabilities as a partner.

The application was made under this form which has been [2*] handed to the Court for life insurance and participating in the other benefits.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

The last of September she started to attend Stanford University. While she was there, she was in communication with her parents in respect to additional property and so on; and the latter part of October, after she had been there about six weeks she suffered what was in the nature probably of a nervous breakdown. In any event, she left Stanford and returned to Cottonwood, where she again participated in the business of the partnership, waiting on the trade and so on, which continued until right after the holidays when she went to Tempe as a student. She was there for approximately two weeks, something like that, when she committed suicide, as a result, apparently, of some nervous indisposition.

Claim was made under the policy for the death benefit and it was rejected.

Mr. Lester, before I point out to the Court the pertinent provisions of the policy, did you want to make any statement as to the fact situation?

Mr. Lester: No. I think for the purposes of familiarizing the Court with the general circumstances that your statement was sufficient. I don't agree with the amount of activity you have said, but generally speaking in chronological order, those were the facts as they occurred.

Mr. Wilmer: The policy is between the Pacific Mutual [3] Life Insurance Company and Gus R. Michaels, Trustee for the Arizona Retail Lumber and Builders Supply Association, a trust fund. The term describing the employer means employer who is a member of the Association and whom the

Trustee reports in writing as accepted by the Trustee as a subscriber employer and is acknowledged in writing by the insurance company. Policy of course is meant as covering the employees of the subscribing employers, and as I understand it, the employers pay the premiums. The classes of employees eligible for insurance hereunder shall be such of the classes of employees of a subscribing employer, determined by conditions pertaining to employment as are reported in writing to the insurance company by the Trustee; provided, however, that part-time employees but not including full-time employees temporarily working on a part-time basis shall not be eligible for insurance hereunder. It is our understanding of this provision that a full-time employee who is temporarily working on a part-time basis remains eligible, but that a part-time employee as such is not eligible. Then, if any of the subscribing employers is a partnership, the partners thereof shall be considered employees within the meaning of this policy if, and while actively engaged in the business of the partnership. If any of the subscribing employers is a proprietorship, the individual proprietor thereof shall be considered an employee on the same terms as though applicable to partners of a partnership. In other words, [4] by that provision, the policy was extended to include as covered by the partners and sole proprietorships. That is the basis upon which this partnership became a policyholder.

Then there is a provision with respect to the ter-

mination of an employee's insurance. It is headed "Termination of an Employee's Insurance." This is page 3, I should have said. "Termination of an Employee's Insurance." An employee's insurance under this policy shall terminate at the earliest time indicated below; without prejudice, however, to any rights to insurance under the section entitled Extended Insurance: (a) The insurance of an employee shall terminate 31 days after termination of employment. Cessation of active work in the classes of employees eligible for insurance shall be deemed termination of employment except that while an employee is absent on account of sickness or injury employment shall be deemed to be continued until premium payments for such employee's insurance are discontinued. At the option of the Trustees the insurance of an employee may be continued during a temporary lay-off but not beyond the end of the policy month following the policy month in which the lay-off starts or may be continued during an authorized leave of absence granted by a subscribing employer for reasons other than sickness or injury but not beyond the period ending three months after such leave of absence starts. Briefly stated, it is our position that the insurance company having prepared this policy is responsible [5] for any ambiguities appearing in it, and that in accordance with the well-recognized rules of law, it would be construed against it. We believe that the provisions governing a partner becoming an insured person under the policy cannot be squared with the provision relating to employees, and such,

and that, therefore, those provisions are of doubtful validity effective. In other words, a partner cannot be laid off. You can speak of a partner as taking a leave of absence; further, there is no definition of the amount of activity which a partner must carry out in the partnership, and therefore, the general rules are appropriate and so long as a partner is not a dormant partner but participating in any fashion in the partnership business, the insurance continues. But, we say that the employee provisions do prevail. Then assuming that the Court is satisfied with the original question, then the business of the girl going to Stanford for six weeks is an authorized leave of absence which does not extend beyond the forbidden 90-day period. Likewise, the few days she attended Tempe before being subject to this attack of whatever you call it that caused her to commit suicide, is likewise an authorized leave of absence which did not extend beyond the 90-day period. In any event, if she originally became a full-time employee in a sense of being a full partner and participating fully in the partnership activities, then when she went to Stanford, since she did retain the partnership position and did remain in consultation with her [6] parents, she was then a full-time employee temporarily on a part-time basis and was covered by the policy.

I think that briefly states our position.

Mr. Lester: Briefly, your Honor, my position is that the object of this particular policy was to make available to owners of the business or proprietors

and partners, the benefits of this insurance in the same fashion and subject to the same qualifications that are provided for by the policy for employees, and in that connection there are really only three clauses in the policy which have any bearing. One states briefly that partners shall be considered employees if, and while actively engaged in the business. That only means that they shall be considered employees. It doesn't mean they shall be considered insurable per se just because they may be partners actively engaged in business. That just means they are to be considered employees. The next clause in the policy which I think is pertinent states that employees shall become insured in this fashion upon completion of three months' full-time employment. Then also the policy states that part-time employees shall not be eligible for insurance. Now, I maintain that the evidence will show that the insured, Joan Medigovich, was not an active partner in the first instance, and therefore, not entitled to be considered an employee; and the second instance, I maintain that even if she were active enough to be considered an active partner and therefore an employee, that her activity and her [7] employment in the business, being less than full time, she did not qualify as an employee to become an insured employee. Thirdly, we have an additional defense which relates to the termination of the insurance. The policy provides that upon cessation of work or activity for more than 31 days results in termination of insurance. Then that statement is followed by a statement saying that at the option of the

Trustee the insurance may be continued as to employees who are merely on leave of absence. Of course we don't have the ninety-day question here because she wasn't gone over ninety days. The point there is when she ceased work to go to Stanford in the fall of 1952 and remained away for over 31 days, she could not possibly have been active or under full-time employment. She, in effect, ceased her work and insurance practically terminated at that point and there will be no evidence to indicate that there was any option exercised by the Trustee in accordance with that term of the policy.

That briefly is my position, Judge.

(The following took place in open Court.)

GUS R. MICHAELS

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Wilmer: [8]

Q. Mr. Michaels, you are the Trustee under a certain policy of insurance, a group policy of insurance of the Pacific Mutual Life Insurance Company as Trustee for the Arizona Retail Lumber and Builders Supply Association, Incorporated, trust fund, is that correct? A. Yes, sir.

Q. Do you have the original group policy with you? A. Yes, sir.

Q. Will you let me see it, please. There are

(Testimony of Gus R. Michaels.)

three policies, only one of which relates to the death benefits for Joan Medigovich, is that correct?

A. Yes.

Q. I am going to return two of them you handed me. I think only one is involved here.

(Plaintiff's Exhibit 1 marked for identification.)

Mr. Wilmer: We offer plaintiff's exhibit 1 for identification in evidence as the original group policy.

Mr. Lester: No objections.

The Court: It may be admitted.

Mr. Wilmer: I wonder if it may be agreed that we can substitute a photostat copy of that and return the original because there are many other people interested other than this particular party.

The Court: By stipulation of counsel there will be an order permitting the counsel for the plaintiff to withdraw [9] Exhibit 1 in evidence upon the substitution of a photostatic copy of the same.

Q. (By Mr. Wilmer): Under this group policy, plaintiff's Exhibit 1 in evidence, Mr. Michaels, you at all times have been the acting Trustee, is that correct?

A. Yes, sir.

Q. You are familiar with the Cottonwood Lumber Company?

A. Yes.

Q. They are members of your Association, is that correct?

A. That is right.

Q. Prior to March, 1952, were you familiar with that Company and the partnership?

(Testimony of Gus R. Michaels.)

A. Yes, sir.

The Court: Will you speak out your answers.

Q. Did you know Joan Medigovich in her lifetime? A. Yes.

Q. You knew Mr. and Mrs. Medigovich and Billy Medigovich? A. Yes.

Q. Do you have occasion in your work with the Association from time to time to call upon the various members of the Association? A. Yes.

Q. And become familiar with the business operation which they carry on? A. Yes. [10]

Q. I take it that the Cottonwood Lumber Company was a member of your Association?

A. Yes.

Q. When they first became a member of the Association, do you know who were the owners of the business?

A. When I came into the Association in 1947 they were members. At that time Mr. Frank Edens I think was the proprietor.

Q. That was Mrs. Medigovich's father?

A. That is right.

Q. Later did you learn of a change in the ownership of that business? A. Yes, sir.

Q. Do you recall when that occurred?

A. Not just exactly but I do recall that Mike and his wife took over the business.

Q. Do you remember there was Mrs. and Mr. Medigovich and do you recall that her brother, Mr. Edens, was in at that time? If you recall that.

A. I think he was, but I wouldn't be too sure.

(Testimony of Gus R. Michaels.)

Q. I am going to hand you plaintiff's Exhibit 2 for identification, Mr. Michaels, and ask you if you recollect receiving that and if you would please tell us what it is.

(Plaintiff's Exhibit 2 marked for identification.)

A. This is an application for group insurance and was [11] received by us in the regular course of business and policy number 226 was issued on July 3, 1952.

Q. Now I am going to hand you plaintiff's Exhibit 3 for identification.

(Plaintiff's Exhibit 3 marked for identification.)

Q. Plaintiff's Exhibit 3 for identification, and I ask you if that is the instrument you refer to as being issued in response to or in accordance with that request? A. Yes.

Q. That is the certificate of insurance and was issued following the receipt of this request for insurance for Joan Medigovich?

A. That is right.

Q. Were you in the association, Mr. Michaels, when this last group policy was entered into?

A. Yes.

Q. Do you recall the circumstances of that policy being negotiated; were you approached by someone from the Company?

A. Well, prior to October 3, 1950, the time we

(Testimony of Gus R. Michaels.)

took out this policy, the Association considered a group plan for smaller members of our Association who were unable to carry their own groups and we discussed insurance with many companies and finally selected the Pacific Mutual Plan.

Q. This group policy was prepared by whom?

A. By the Pacific Mutual. [12]

Q. The language used in this policy is language which was selected by that company, and this printed policy was tendered to you as the policy they would write for the Association and the group?

A. Yes.

Q. I take it you as Trustee and the group had no part in the phraseology found in plaintiff's Exhibit 1 in evidence or in selecting the words used?

A. No.

Q. Mr. Michaels, under this policy you reported to the Company the fact of the issuance of the certificate dates as they were issued?

A. As they were issued?

Q. Yes. A. No, that isn't exactly——

Q. How did it work?

A. We make an accumulation report every month of all the insurance collected from the subscribing members and turn that in in one report to the company monthly.

Q. Do you have one of such reports with you?

A. Yes.

Q. Let me see that. That will be simpler than explaining it. Do you have one, Mr. Michaels, that

(Testimony of Gus R. Michaels.)

relates just to the death or are they all reported in one?

A. There are four insurance categories under this policy [13] plan. There are 5,000, 3,000, 2,000 and 1,000. In that accumulation report we report the number of policies at 1,000; the number of policies at 2,000, at 3 and at 5. It is extended at the rate per thousand and that makes up the amount of the insurance sent in. Then, under the medical provision of the policy we have two divisions, one for dependents and one for employees, and that is calculated and goes in one.

Q. I take it you need that report for your files. I wonder if you could let us have one for illustration purposes only and I am sure counsel can agree that we can get a copy.

A. I have a working copy. I will let you have this typed copy. This is a report of July 3, the last report.

Mr. Lester: You can mark that if you want to.

The Court: That will be Number 4. There will be an order permitting counsel for the plaintiff to withdraw Number 4 in evidence upon the substitution of a copy, a photostatic copy of it, or a carbon copy.

The Clerk: Plaintiff's Exhibit 4 in evidence.

Q. Number 4 in evidence, Mr. Michaels is illustrative in the fashion in which you as Trustee reported to the insurance company the number of policies outstanding, the type of policies and the amount of premium that was payable?

(Testimony of Gus R. Michaels.)

A. That is right.

Q. You simply remitted to them the amount due the Company?

A. That is right, each month. [14]

Q. The method of determination of the employees or the persons who were eligible for insurance was left in your hands, is that correct; in other words, if you received a request such as is shown by plaintiff's Exhibit 3—I probably should offer these in evidence if they haven't been.

Mr. Lester: No objection.

The Court: That is numbers 2 and 3?

Mr. Wilmer: Yes, your Honor.

The Court: Exhibits 2 and 3 for identification will be admitted in evidence.

The Clerk: Plaintiff's Exhibits 2 and 3 in evidence.

Q. At such time, Mr. Michaels, as you received an application, such as plaintiff's Exhibit 2 in evidence, did you make the determination if the application was one which should be accepted and if they were eligible for insurance? A. Yes.

Q. Do you base that on your acquaintance with the parties and your knowledge of their operations?

A. Actually in that regard and the fact the employer pays the entire amount of insurance on employees and would naturally not fill in an application for someone unless they were employed.

Q. In other words, the employer under this program paid the entire insurance premium on the employee? A. That is right.

(Testimony of Gus R. Michaels.)

Q. I take it then, that when you received an application [15] such as this you then determined if it was in order to issue the certificate of insurance?

A. That is right.

Q. You simply reported an additional insured of that class of insurance in your next report?

A. That is right.

Q. Were you quite well acquainted with the Medigovich family, Mr. Michaels?

A. Yes.

Q. You were aware then, of course, of the relationship when Joan became a partner, I presume?

A. Yes.

Q. Do you recall at any time whether or not Mr. and Mrs. Medigovich discussed with you that Joan might attend Stanford?

A. Actually I don't recall any such.

Q. Whether she did or not?

A. No, I don't.

Q. Mr. Michaels, did you have any objection as Trustee to her attending Stanford under a mutually agreeable arrangement with her other partners?

Mr. Lester: That is objected to as immaterial. I think what Mr. Wilmer is driving at concerns this option provision and I don't think the question really can be asked what he might have done or would have done at the time the opportunity arose to exercise the option unless there is a [16] showing that there was an opportunity to exercise the option and he did exercise the option. It certainly can't be asked if he did or in what manner he would have been inclined to exercise the option in the past.

(Testimony of Gus R. Michaels.)

Mr. Wilmer: I meant only briefly to say this: I do not believe that the provision with respect to leave of absence is related to the Trustee's exercise of his option. I think that is related solely to the temporary lay-off and that the further provision that it might be extended for a three months period, or not to exceed three months beyond a leave of absence, requires a leave of absence authorized by the employer, and that the Trustee would have no discretion or option in relation thereto as employer. Should the Court take a contrary view, I desire to show from this witness and offer to prove by this witness that if Mr. and Mrs. Medigovich had advised him they intended to give Joan, or permit Joan to go to Stanford, that he would have been entirely agreeable that she do so so long as the premium is paid, because I don't believe the insurance company can exercise the option, or can they at this time elect to exercise an option not to continue the insurance if the Trustee is not desirous of so doing and is prepared to say he ratifies that the leave of absence be given and he does accept the premiums during that period of time.

Mr. Lester: May I say this: The clause in the contract we are talking about is perfectly clear. It states [17] that at the option of the Trustee the insurance may be continued during the leave of absence, and Mr. Michaels has already testified that he did not know about this girl having gone to Stanford or that she was going to go. There is no evidence that he knew about any proposed leave of

(Testimony of Gus R. Michaels.)

absence, and now Mr. Wilmer is asking him to state what his position would have been had he known that the girl was going away on an alleged leave of absence.

The Court: I have some doubt about its admissibility. I am going to let it in because I can later determine if it is not proper and disregard it. My view is possibly a general policy on the part of the Trustee to let employers give such leave of absence as they might desire consistent with the insurance remaining in force. That might be admissible. I have a great deal of doubt what he would have done if it had been brought to his attention; but I am going to let it in.

Mr. Wilmer: So that the record will not appear that way, to correct Mr. Lester's statement of Mr. Michaels' testimony: he did not testify that he did not know about it. He testified that he did not remember any discussion with the Medigoviches, and I believe they will testify they did discuss with him that she was going to Stanford.

Q. (By Mr. Wilmer): Mr. Michaels, may I ask this question then: With respect to partners and with respect to the matter of insurance remaining in force with respect to employees on a [18] leave of absence if the employer continued to pay the insurance premiums during an allowable period of absence, did you have any reason or cause for not agreeing to that?

Mr. Lester: I object to that on the same grounds.

The Court: Same ruling.

(Testimony of Gus R. Michaels.)

A. Actually that is more a determination of the employer. As long as the bills go out every month as they do and the insurance is paid every month I have really no way of knowing a man is on leave or not.

Q. I take it as a matter of general policy so long as the employer is satisfied to pay the insurance premiums, you would be quite agreeable to going along that the insurance remain in force?

A. Oh, yes.

Cross-Examination

By Mr. Lester:

Q. By the same token, Mr. Michaels, if an employer should elect to continue to pay premiums and carry a person on the payroll or the insurance program even though the employee may have quit work a year or two years in the past, you would have no way of knowing that and you would have no objection to continuing the premiums, would you?

A. I don't know how I would know.

Q. In fact, you don't know, do you, unless you are specifically advised about persons who are dropped from the [19] payroll from the employee or partnership status?

A. That is right.

Q. Or advised as to any leaves of absence or sick leaves and things of that kind?

A. Yes.

Q. You have to rely on the employer to inform you the status of the people that are insured under the plan in their establishment?

(Testimony of Gus R. Michaels.)

A. Yes, I mean there has been—they don't inform me of anything; they just pay the premiums. I am not asked anything.

Q. When these premiums are paid you assume they are being paid in accordance with the policy provisions? A. That is right.

Q. You do not go out to check and see that every employee is actually working? A. No.

Q. At that particular establishment?

A. No.

Q. The only link between the insurance company and the persons who are insured, the employers and the employees, as I understand it, is yourself?

A. That is right.

Q. The master policy, of which there is only one, is issued to you, is that correct?

A. To the Association and I am the Trustee. [20]

Q. To you as Trustee for the Association?

A. That is right.

Q. That policy covers—correct me if I am not right on this—all those who are members of the Association and their employees who are qualified for insurance, is that correct? A. Yes.

Q. And who are issued certificates?

A. Yes.

Q. In the case of Joan Medigovich she became insured when she was issued a certificate. Does a certificate indicate when?

A. You have the application card up there, your Honor.

The Court: Exhibit 3 has an effective date on it.

(Testimony of Gus R. Michaels.)

A. Up in the corner of the card you will see the number and the date on which it was issued.

Q. That would be July 3, 1952, is that correct?

A. Yes.

Q. When did the Cottonwood Lumber Company, the employer, subscribing employer, become a subscribing employer?

A. When the plan first went into operation, October 3, 1950.

Q. In other words, Joan Medigovich was issued a certificate some considerable time after the Cottonwood Lumber Company became a subscribing employer? [21]

A. That is right.

Q. The two didn't become insured simultaneously?

A. No, she came in later.

Q. Who actually issues the certificate?

A. We do in our office.

Q. When you say "we," you mean you as Trustee for the Association?

A. That is right.

Q. The Company then, I understand gives you the certificates in form and you make them out and deliver them to the various applicants?

A. That is right.

Q. The application goes directly to you in the form of Exhibit 2?

A. Yes, sir.

Q. That is all you get, is it not, when someone wants to apply for insurance under this plan, that little request?

A. Yes.

Q. Immediately upon receipt of that request you then issue a certificate, is that correct?

(Testimony of Gus R. Michaels.)

A. Under the regulations of the company, they make an application, send in the application card at any time by the employee and must be in ninety days, and it is issued at the end of ninety days.

Q. You wait ninety days in accordance with the policy [22] before issuing the certificate?

A. That is right.

Q. Ninety days after you get the request?

A. It may come in any time during that period.

Q. From then on the only thing you get from the employers is the blue tally sheet, Exhibit Number 4?

A. We don't even get that. We have a big supply of them and we make them out every month.

Q. That is plaintiff's Exhibit Number 4?

A. Yes, sir.

Q. You don't receive this; you make it out in your own office?

A. We receive these in a big supply and make them out every month.

Q. You actually make it out and it is not made out for you; the insurance company doesn't make it out?

A. I make it out myself.

Q. All you do with that exhibit Number 4 is simply calculate the number of persons that are covered within that period of time, is that right?

A. Well, the number of persons and the amount of insurance for each category.

Q. And the amount of premiums involved?

A. That is right. This is a recapitulation of what it is.

(Testimony of Gus R. Michaels.)

Q. Do you send that report to the insurance company? [23] A. With a check, yes, sir.

Q. Is that the only thing that the insurance company ever gets from you? A. Yes.

Q. So, as far as the insurance company, they only know the number of persons that are covered?

A. That is right.

Q. And the amount of premiums they are receiving from you? A. That is right.

Q. For a given period of time?

A. That is right.

Q. Do you know, Mr. Michaels, that Joan Medigovich went to Stanford University in the fall of 1952? A. No, I did not.

Q. Did you know she was going to go?

A. I wouldn't say positively. I would say I have known the Medigovich family many years, and well, I visit at their home. I have talked to the kids and we have talked about my kids and that. It may have come up in the conversation.

Q. It didn't come up formally in connection with the policy? It didn't come up that way?

A. Actually I don't remember anything like that.

Q. You don't have any official record of any such notification that shows she was going to go to Stanford or that she did go? [24]

A. Not one way or the other.

Mr. Lester: I believe that is all.

(Testimony of Gus R. Michaels.)

Redirect Examination

By Mr. Wilmer:

Q. Mr. Michaels, plaintiff's Exhibits 1, 2, 3 and 4 were all supplied you by the Company?

A. Yes, sir.

Q. The language contained in them was language the Company selected? A. Yes, sir.

Q. The information which you required to obtain before issuing a policy was the information which is set forth on this request for insurance?

A. Yes, sir.

Q. This report which you sent in, plaintiff's Exhibit 4, that was on the form furnished you by the Company? A. Yes, sir.

Q. Did you have any request from the Company at any time to supply any additional information?

A. No, sir.

Q. Did you have any further instructions from the Company as to what they wanted in the way of information in connection with the issuance of any of these certificates? A. No, sir.

Q. Did you have instructions from the defendant Company, Mr. Michaels, as to the yardstick you were to apply in [25] determining if a partner, for instance, was a partner eligible for insurance?

A. No, sir.

Q. I believe that at the same time Joan applied for insurance that her younger brother, William, applied for insurance? A. That is right.

(Testimony of Gus R. Michaels.)

Q. And his application card shows that he was then 12 or 13 years of age?

Mr. Lester: I object as immaterial. I don't see how someone else's insurance can have any bearing on this case.

The Court: Objection overruled. The card is the best evidence.

Q. Do you have the application card with you in the Medigovich file?

A. Yes, sir. May I have that back later on?

Q. May we substitute a copy of that?

Mr. Lester: Perfectly all right.

The Clerk: Plaintiff's Exhibit 5 for identification.

Q. Referring to plaintiff's Exhibit 5 for identification, was that request for insurance filed with you at the same time and was a certificate of insurance issued at the same time Joan Medigovich received her insurance policy?

A. Yes, certificate Number 267, dated July 3, was issued at the same time.

Q. This shows that Billy was born the 6th day of April, 1939? [26] A. Yes.

Q. You have been accepting premiums from the Cottonwood Lumber Company on Billy Medigovich and are accepting them today? A. Yes.

Q. And have been accepting them since the death of Joan, and the Company became apprised as to her efforts—

A. On Billy continuously since we issued the policy.

(Testimony of Gus R. Michaels.)

Q. As of today? A. That is right.

Q. Has the Company ever told you since they rejected Joan's claim that you ought to stop accepting premiums on Billy? A. No, sir.

Q. Have they ever told you you are not to accept premiums on any partners that are not of full age and an adult person? A. No, sir.

Mr. Wilmer: That is all.

The Court: Has this been offered?

Mr. Wilmer: If I did not, it is an oversight and I do so at this time.

The Court: Number 5 for identification.

Mr. Lester: I have no objection.

The Court: It may be admitted. There may be an order that exhibit 5 in evidence may be withdrawn by counsel by substitution of a photostatic copy of the same.

Q. (By Mr. Wimer): Gus, did you have occasion to attend [27] various lumbermen's conventions? A. Yes, all of them.

Q. Do you recall seeing Joan there as a partner of the Cottonwood Lumber Company?

A. Yes.

Q. Attending the convention as a representative of her Company? A. Yes.

Q. Did she have a tag on? A. Yes, sure.

(Testimony of Gus R. Michaels.)

Recross-Examination

By Mr. Lester:

Q. When was this convention you told us about?

A. Back to 1947. We had conventions in '47, '48, '49, '50, all through there. Mike and Mattie have come to the conventions.

Q. Where is this convention held each year?

A. In different places.

Q. In Arizona? A. Yes.

Q. You have seen Joan at most of those conventions even as far back as 1947?

A. Back in that neighborhood.

Q. You realize that she wasn't a partner then?

A. It was immaterial.

Q. In other words, she was down there with her mother and father? [28] A. Yes.

Q. She didn't go to the convention alone as the sole representative of the Cottonwood Lumber Company; you don't mean to suggest that?

A. No.

Q. Her younger brother was probably there at these conventions from year to year along with them, was he not? A. That is right.

Q. Again with his mother and father?

A. Yes.

Q. Did Joan take the floor at any of the conventions?

A. I don't remember, but I don't think so.

Q. Did she accomplish any business at these conventions that you know of?

(Testimony of Gus R. Michaels.)

A. A lot of business was accomplished at these conventions; I wouldn't know.

Q. You didn't see her performing any duties?

A. No.

Q. At these conventions? A. No.

Q. As far as you know she was there only because her parents were there? Just socially?

A. I wouldn't know at all times but——

Q. As far as you know?

A. She went with her parents, yes. [29]

Q. With regard to this exhibit, plaintiff's Exhibit 5, which is the application of the request for insurance for Billy Medigovich, who at that time was only 12 or 13 or 14 years old, I ask you again—this card is made out by the applicant in this case, Billy Medigovich, is that correct?

A. Yes, sir.

Q. He or his employers sends it to you, is that correct? A. That is right.

Q. What happens to that card after it comes to your office?

A. We make out the certificate, send it to him and file it.

Q. What happens to the card showing how old he is? A. Nothing.

Q. It stays in your office, doesn't it?

A. That is right.

Q. It never goes to the insurance company?

A. That is right.

Q. They don't know how old Billy is?

A. Yes, once a year the insurance representative

(Testimony of Gus R. Michaels.)

goes through the complete files and takes the age and the amount of insurance of each; some time prior to October, the anniversary date. Every year that is done.

Redirect Examination

By Mr. Wilmer:

Q. When this representative of the Pacific Mutual goes through these cards, did he ever come back to you and criticize or direct that you shouldn't accept that type of company as an [30] insurer?

A. No.

Mr. Wilmer: That is all. I have two or three witnesses not exactly in point that I would like to put them on so I can excuse them.

The Court: Do you want to excuse Mr. Michaels?

Mr. Wilmer: Yes.

Mr. Lester: No objection.

The Court: You may leave, Mr. Michaels.

JAMES F. HAMIL

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Wilmer:

Q. Will you state your residence and occupation, please?

A. My name is James F. Hamil. I reside in Phoenix, Arizona, and am employed by the Employment Security Commission of Arizona.

(Testimony of James F. Hamil.)

Q. You were served with a subpoena duces tecum for you to produce certain records of the Employment Security Commission? A. Yes.

Q. These are in your custody?

A. That is right.

Q. I understand under the rules and regulations that there [31] is in your mind and in the mind of the Commission some limitation upon the right to disclose the contents of the record unless ordered by the Court? A. That is right.

Q. It is your request before you be asked to testify with regard to the contents of these records, even though the employer is agreeable, that the Court direct you to do so?

A. I would appreciate that.

Q. I believe, your Honor, there is some question that unless the Court orders the witness to divulge the information in the reports——

The Court: The Court will order Mr. Hamil to produce any records or other documentary records in his custody which may be pertinent and material in this case.

Mr. Hamil: Thank you.

Q. Have you brought with you the file of the Cottonwood Lumber Company? A. Yes, sir.

Q. That is the file of the Employment Security Commission? A. That is correct.

Q. Does that file contain any reports with respect to the formation of a partnership consisting of Mr. and Mrs. Mike Medigovich and their two children? A. It does.

(Testimony of James F. Hamil.)

Q. Will you segregate that material for me, please? May the [32] record show that Mr. Hamil has handed me a letter, upon the letterhead of H. Marvin Dennis & Company, Certified Public Accountants, together with an employment status report from his file, which we ask be marked for identification?

The Clerk: Plaintiff's Exhibit 6 for identification.

Q. Mr. Hamil, how long have you been with the Employment Security Division?

A. Since March, 1938.

Q. Under the Employment Security Law of the State of Arizona, an employer is required to file a status report at such times as there is a change in the employer's legal status, is that correct?

A. That is correct.

Q. So that you have as part of your records the correct legal entity of who is the employer?

A. That is correct.

Q. Handing you Plaintiff's Exhibit 6 for identification, I will ask you if this is the record filed April 17, 1952, of a change in the employer's status of the Cottonwood Lumber Company?

A. It is. The status report was filed April 17th, April 11, the letter was dated April 17th.

Q. Does your file show the employer which preceded the new partnership employers immediately prior to this change? A. Yes, sir. [33]

Q. Without taking that out of your file, unless

(Testimony of James F. Hamil.)

counsel requests it, will you tell us who according to your records the preceding or previous employer was to the change in status reflected by plaintiff's Exhibit 6 for identification?

A. To March, 1952, my records show it was a business conducted as a partnership composed of Mr. M. S. Medigovich, J. F. Edens and Mattie Edens Medigovich.

Q. And that change was made March 1, 1952?

A. That was the effective date of the change.

Mr. Wilmer: We offer in evidence plaintiff's Exhibit 6 for identification.

Q. May I ask one further question. Subsequent to March, 1952, and through the first months of 1953, was there any change in the employer's status report as filed with your Commission?

A. I have been informed there was a change at the end of January, 1953.

Q. Do you have an employer's status report reflecting that change? A. I do.

Q. That was as of the end of January, 1953?

A. That is correct.

Q. Did it show why the change in status, or just a change in status?

A. I don't believe it shows why. It shows a change since February 1, 1953, is shown to be a partnership, M. S. Medigovich, [34] M. E. Medigovich and W. M. Medigovich.

Q. That status has continued until the present time? A. So far as I know.

(Testimony of James F. Hamil.)

Mr. Lester: I have no objection to plaintiff's Exhibit 6.

The Court: It may be admitted.

The Clerk: Plaintiff's Exhibit 6 in evidence.

Cross-Examination

By Mr. Lester:

The Court: Do you want an order on Exhibit 6?

Mr. Wilmer: I presume you would like to have it back?

Mr. Hamil: I would like to have it back or copies of it.

Mr. Wilmer: If counsel is agreeable we will undertake to make a copy and substitute it if it is agreeable.

Mr. Lester: All right.

The Court: There may be an order permitting the withdrawal of Exhibit 6 in evidence by counsel for the purpose of the substitution of a copy.

Q. (By Mr. Lester): You do not know, do you, Mr. Hamil, whether or not or to what extent, Joan Medigovich may have been active in the Cottonwood Lumber Company? A. I don't know the lady.

Q. You wouldn't have any idea if she worked there or not? A. No.

The Court: Do you want to excuse Mr. [35] Hamil?

Mr. Wilmer: Yes.

The Court: You may leave if you desire.

Mr. Lester: That is all right.

ARTHUR H. BROOKS

called as a witness herein, having been first duly sworn, testified on his oath as follows:

Direct Examination

By Mr. Wilmer:

Q. Your name is Mr. Arthur Brooks?

A. That is right.

Q. What is your occupation?

A. I am a public accountant with H. Marvin Dennis & Company in Phoenix.

Q. Were you with them in 1952?

A. Yes, sir.

Q. And continued up to this time?

A. That is right.

Q. Did you have occasion in connection with your employment with Mr. Dennis to do certain accounting work for the Cottonwood Lumber Company?

A. I did.

Q. When did you first take over that account?

A. At the time Mr. and Mrs. Medigovich and Joan and Billy bought out the J. F. Edens interest in the partnership.

Q. Were you familiar with that [36] transaction?

A. I was.

Q. Do you recall what it was?

A. Well, yes, I do. Prior to the time that it was a partnership, prior to that time consisting of Mr. and Mrs. Medigovich and Mr. J. F. Edens, then along in, I think it was in January, 1952, they bought out Mr. Eden's interest.

(Testimony of Arthur H. Brooks.)

Q. Do you know the source of money that was used to buy out Mr. Eden's interest?

A. It came from three places. Part was money in the Company; part was money that belonged to Mr. and Mrs. Medigovich prior; part they borrowed from a gentlemen, I can't think of the name but it is immaterial; and part belonged to Billy and Joan.

Q. Do you know of the source of money that Billy and Joan put in the business?

A. I do.

Q. What was that?

A. It came from Mrs. Medigovich's mother, Mrs. Frank Edens.

Q. It was an inheritance from the grandmother?

A. That is right.

Q. Do you know the amount of that, or do you recall?

A. It was approximately \$10,000, I believe or it might be a few dollars one way or the other. I can't exactly recall.

Q. At that time, the later part of March, 1952, these two minor Medigovich children invested all their own money, [37] around \$20,000, in the Cottonwood business?

A. That is right; it was my suggestion they do this. Prior to that time Mr. and Mrs. Medigovich wanted them to put it in as a loan and they were going to repay them, but I suggested they form a family partnership consisting of themselves and the two children.

Q. Did you participate any in the arrangements

(Testimony of Arthur H. Brooks.)

with respect to what the understanding of the partnership would be? A. Yes.

Q. Was there any agreement as to the amount of work which the children would do?

A. None other than they were supposed to devote their time when they were home from school to the business.

Q. Did you have occasion, Mr. Brooks, to be there from time to time? A. I was.

Q. That is in 1952?

A. That is right.

I was in the Lumber Company practically every month, in the office I mean. I would go in and visit.

Q. Did you have occasion to notice the amount of work that Joan did about the business?

A. At the times that I visited the office of the Cottonwood Lumber Company, usually she was there doing work.

Q. In the office? [38]

A. In the office, that is right.

Q. What type of work was she doing?

A. Always clerical work.

Q. Making records and——

A. Checking extensions on the sales slips and one thing or another.

Q. Did you have occasion to prepare the income tax return for the partnership?

A. Yes, I did.

Q. Do you have copies of those as filed?

A. I have.

Q. Will you let me see them, please? Under the

(Testimony of Arthur H. Brooks.)

income tax laws, is it required when a partnership terminates that notice be filed with the Internal Revenue Department of that termination, setting up the partners?

A. The partnership is required to send to the Social Security Division the identification number, but the final return on the predecessor's partnership is marked final, and of course, all payroll reports are marked final.

Q. You have those reports with you, or copies of them, of the final partnership return of the Medigovich and Edens partnership? A. Yes, I do.

Q. Will you let me have that copy of the partnership return for 1952? [39]

A. This is a copy of the first return beginning in February of '52. This is the first return of the new partnership.

Q. That includes also——

A. This is a copy to the State of Arizona. This is a copy of the final return consisting of Mr. and Mrs. Medigovich. I am sorry, this is the final return of the partnership that Joan was in. This is the copy of the final return at the time that J. F. Edens' interest was purchased.

Q. This closed out the old partnership of J. F. Edens and Mr. and Mrs. Medigovich?

A. That is right.

Mr. Lester: No objection to either 7 or 8.

The Court: They may be admitted.

The Clerk: Plaintiff's Exhibits 7 and 8 in evidence.

(Testimony of Arthur H. Brooks.)

Q. Did you have occasion, Mr. Brooks, to prepare a financial statement? A. I did.

Q. Do you have copies of any of those papers?

A. This is one at the time that Joan was in the partnership, that we sent to the Lumbermen's Credit Association in Chicago.

Q. That was prepared by you from your knowledge of the partnership affairs and business gains as their accountant?

A. That is right. Here is the copy we prepared for Medigovich and the two children on August 31, 1952, at the [40] time Joan—after Joan and Bill had been in the partnership. They were on a fiscal year ending August 31st.

Q. This is the financial statement showing the respective partner's interest?

A. That is right. You will notice we adjusted their investments to \$10,000. They withdrew the amount over that amount so that each had \$10,000 at that time.

The Clerk: Plaintiff's Exhibits 9 and 10 for identification.

Mr. Wilmer: We offer Exhibits 9 and 10 for identification in evidence.

Mr. Lester: I have no objection to 9.

The Court: 9 may be admitted.

The Clerk: Plaintiff's Exhibit 9 in evidence.

(Testimony of Arthur H. Brooks.)

Cross-Examination

By Mr. Lester:

Mr. Lester: I have no objection to 10.

The Court: 10 may be admitted in evidence.

The Clerk: Plaintiff's 10 in evidence.

Q. (By Mr. Lester): Mr. Brooks, showing you this exhibit——

A. I think he marked them on the back, but I wouldn't be sure.

The Clerk: This is plaintiff's 8.

Q. It is in evidence?

The Clerk: It is in evidence.

Q. Showing you plaintiff's Exhibit 8 in evidence, which I [41] believe you have identified as a partnership income, United States income return?

A. That is correct.

Q. That is for what period?

A. From September 1, 1952, to January 31, 1953.

Q. The return is for how many individuals as partners? A. Four.

Q. Four? A. That is right.

Q. Who are they?

A. M. S. Medigovich. M. E. Medigovich, Joan Medigovich, William M. Medigovich.

Q. They are listed at page four?

A. Page four of the Federal return.

Q. Calling your attention to Schedule K on page four of that return, there is a list of four partners which you have just read off?

(Testimony of Arthur H. Brooks.)

A. That is right.

Q. The first column next to the list of the names of the partners is for what purpose?

A. It is to designate the percentage of time devoted to the business.

Q. What is designated there for Joan Medigovich?

A. That she devote part of her time to the business.

Q. What is designated for Mr. and Mrs. Medigovich? [42]

A. That they devoted all their time to the business.

Q. I believe you stated that you customarily went to Cottonwood on business; how often, how frequently?

A. Every month.

Q. Once a month?

A. That is right.

Q. You would be in town overnight?

A. Sometimes as much as a week; usually as much as a week. The fact is I stay with the Medigoviches sometimes at their house.

Q. Do you know whether or not Joan was working anywhere else other than at the Cottonwood Lumber Company?

A. I don't know. I heard some information about that but I don't know what amount.

Q. In other words, you would not see enough of her to know whether or not she had any other job in town or any job at all, is that right?

A. I know in trying to get Social Security she

(Testimony of Arthur H. Brooks.)

had some other jobs but it was just about the time she got in the partnership.

Q. You didn't see enough of her to observe her activities?

A. Seeing her a week of a month, that is all I can testify to. The other three weeks I couldn't.

Q. A great part of the time she was in school no doubt?

A. Part of the time she was. She had been to Stanford. [43]

Q. When did you take over as the accountant for the Cottonwood Lumber Company?

A. After Medigovich bought out J. F. Edens' interest.

Q. That was in February or March of 1952?

A. No, it was prior to that. It would be——

Q. 1951?

A. No, along in January of '51, I believe.

Q. January of '51?

A. 1952, it might be. I can't tell without the papers relative to the exact dates.

Q. Did you have occasion to observe or notice or pay any attention to whether or not Joan was in high school or another school of one kind or another around Cottonwood?

A. I know she was. I talked with her and we discussed what she was doing in school at different times.

Q. She did go to school? A. That is right.

Q. You don't mean to imply each time you went

(Testimony of Arthur H. Brooks.)

there on your visits to Cottonwood that she was working whether it was during school or not, at the Cottonwood Lumber Company?

A. Well, usually in the afternoons sometimes she would be there. I wouldn't say that each time I went to Cottonwood that I saw Joan in the office.

Q. Did you notice whether or not she was there at any time seemingly performing one kind of duty or another before she became a partner? [44]

A. I don't recall that she was ever in the office prior to that time and I was just visiting there occasionally; I had no business there.

Q. When was the first time, Mr. Brooks, that you noticed she was doing some kind of work in the lumber business? A. I wouldn't recall.

Q. It may have been 1951, is that right?

A. It might have been, that is true.

Q. Did you become acquainted with the Medigoviches for the first time in January of 1951?

A. I had known them prior to that time.

Q. About how long?

A. I guess I have known them twelve to fifteen years.

Q. Haven't the kids always been in and around the lumber office there as long as you can remember?

A. No, I don't think that they were. I can't say definitely.

Q. Aside from school hours, didn't you ever see them in and around the business?

A. I might have seen them walking through the

(Testimony of Arthur H. Brooks.)

lumber yard. I wouldn't say definitely; I don't know.

Q. Where was the Medigovich residence with relation to the lumber business?

A. It is right in the next street. You can go through the lumber yard in the back way to the Medigovich home.

Q. The residence and the business are [45] together? A. Yes.

Mr. Lester: That is all.

The Court: Do you want to excuse Mr. Brooks?

Mr. Wilmer: Yes.

The Court: You may be excused.

MATTIE EDENS MEDIGOVICH

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Wilmer:

Q. You are Mattie Edens Medigovich?

A. Yes, I am.

Q. The plaintiff in this action. Your husband is sitting here beside me? A. Yes, sir.

Q. How long have you been married to him?

A. Twenty-one years this August.

Q. How long have you lived in Cottonwood?

A. Since 1922.

Q. I take it that you have raised your family there and have grown up there yourself?

A. Yes, sir.

(Testimony of Mattie Edens Medigovich.)

Q. Prior to the time that you were married to Mr. Medigovich, was your father in the lumber business?

A. Yes, sir. [46]

Q. Has been for many years?

A. Yes, sir.

Q. His name was Edens?

A. W. F. Edens.

Q. After you and Mr. Medigovich were married, did you go into the lumber business also?

A. Yes, sir.

Q. Did you assist your father in the business while you were living with him?

A. Yes, sir.

Q. When did your father retire from actively participating and managing the lumber yard?

A. 1951, January, 1951; not from active management; excuse me, I will correct that. He retired from part ownership in 1951. He had not been in the management of the lumber yard for some time.

Q. Then in 1951 he got out entirely?

A. Yes.

Q. And who took his place?

A. My husband and I and my brother.

Q. J. F. Edens? A. J. F. Edens, yes.

Q. You operated that as a partnership?

A. Yes.

Q. In January, 1952, did your brother desire to withdraw [47] from the partnership?

A. Yes, sir.

Q. You heard Mr. Brooks' testimony with respect to the formation of the new partnership?

(Testimony of Mattie Edens Medigovich.)

A. Yes, sir.

Q. Do you recall the preparation of the partnership agreement, Mrs. Medigovich?

A. Yes, sir. We talked about it with Mr. Norton, our attorney in Cottonwood.

Q. Mr. K. Norton, the attorney in Cottonwood?

A. Yes, sir.

Q. Did you go over with him the terms of the agreement and how it was to be prepared?

A. Yes, sir.

Q. Do you recall whether or not it was actually ever reduced to final, formal writing?

A. No, I don't, but I knew it was our understanding that we certainly understood how it was supposed to be.

Q. What interest did Joan and Billy have in the business?

A. That had to be figured out by Mr. Brooks from the amounts of money to put in the business.

Q. Their participation was in relation to the amount of money they put in as against the over-all evaluation of the business, is that correct?

A. Yes, sir. [48]

Q. Prior to the time when this partnership was formed, had you had a policy or subscribing policy with the Pacific Mutual?

A. Yes, sir, I did.

Q. Did your father?

A. Yes, my father did also.

Q. At one time did you then cancel it as to your father?

(Testimony of Mattie Edens Medigovich.)

A. Yes, sir. When my father became inactive in the business, I wrote and cancelled the payments because we didn't want to pay on somebody that wasn't naturally an employee.

Q. When he dropped out of the business you then cancelled the certificate as far as he was concerned?
A. Yes, sir.

Q. Prior to the time when you formed this new partnership between yourself, your husband and the two children, had Joan and Billy helped in the lumber business?

A. Yes, sir. They came in occasionally because I wanted to teach them like I had been taught. I had been taught by my father and mother for a great many years before I was in the lumber business.

Q. They did some work in the business before they became partners?
A. Yes.

Q. Were they paid for that?

A. Yes, by us. [49]

Q. What duties was Joan to perform, Mrs. Medigovich, under the partnership arrangement?

A. Under the partnership arrangement, as she had been taught by me, she was to help me with the statements every month. I would get out the statements and she would put the tickets with the statements, put them in the envelopes and mail them. She also had to add columns of figures for me and check the columns which were gone over by Mr. Brooks. She also made the bank deposits for me, and

(Testimony of Mattie Edens Medigovich.)

note receipts whenever at any time a bill was paid, and when she was in the office she was to write receipts, and also she was to take over any time Mike and I were out whenever anyone called for merchandise, she had a set of keys and she opened up for customers.

Q. You follow the practice there that during off-business hours if a customer comes in from the country and needs something you supply them?

A. We are in a small town and our contractors many times get in after hours.

Q. Other than the time that Joan was attending school, how much of the time did she attend to the business?

A. Part of every day.

Q. Did she wait on trade also?

A. Yes, sir.

Q. When you and your husband were away she was in charge of the business? [50]

A. Yes, sir.

Q. Do you recall whether or not she signed checks?

A. I believe that she never had an occasion. She has written the checks and put them through the machine and all that, but I was usually there at the 10th of the month when we paid our bills. We don't pay bills any other time.

Q. Once a month? A. Once a month.

Q. She did make bank deposits?

A. Yes, sir.

Q. Did you and your husband and the children,

(Testimony of Mattie Edens Medigovich.)

particularly Joan, talk over the partnership business and how it would be conducted?

A. Yes, sir, because it was their money going into the partnership.

Q. You felt after they put up \$20,000 they were entitled to participate in the running of the business?

A. Yes, sir.

Q. At the time when Joan went to Stanford, Mrs. Medigovich, do you recall prior to that that you attended a Lumbermen's Convention?

A. Yes, sir.

Q. Where was that? A. In Tucson.

Q. Do you recall whether or not she carried or wore a [51] button placard?

A. Yes. Joan Medigovich, Cottonwood Lumber Company.

Q. That was identifying? A. Yes.

Q. Whatever they called them, of the various representatives were you advising the others what they were?

A. Yes, sir. For instance, if you take somebody else in, it is put on a guest.

Q. All have to wear what they call a nameplate so you are here as a member of the Association or a guest? A. That is right.

Q. And she did wear the Cottonwood Lumber Company partners' insignia? A. Yes, sir.

Q. Did you at that time discuss the question of her going to Stanford? A. Yes, sir.

Q. Do you recall the occasion for its being discussed?

A. Of course we know all the lumbermen very

(Testimony of Mattie Edens Medigovich.)

well. We have to because I was brought up in the lumberman business and I went to conventions from the time I was eleven or twelve years old with my father. Everybody would ask her where she was going to school, and of course they knew she was graduating from high school that year.

Q. Do you recall whether or not that was discussed with [52] Mr. Michaels?

A. Yes, when he was present and many others present also. Of course, he was very busy with the convention. I knew that.

Q. It was a matter of common knowledge because Joan was pretty well liked; they all knew she planned to go to Stanford? A. Yes, sir.

Q. Did you ever have any information from Mr. Michaels or any one else that that wouldn't be appropriate or that wouldn't be proper?

A. No, sir,

Q. Have any influence on the insurance?

A. No, sir.

Q. And continue during this entire period. Did you pay the premiums? A. Yes, sir.

Q. When did Joan leave for Stanford?

A. About the 27th of September.

Q. When did she return?

A. November 14th or 15th.

Q. She was gone something over six weeks?

A. Maybe the 16th. Something over or about six weeks.

Q. During that period of time did you have occasion to correspond with her?

A. Every day. [53]

(Testimony of Mattie Edens Medigovich.)

Q. Did she answer your letters with respect to business matters particularly? A. Yes, sir.

Q. Did you have occasion during that period of time or did the partnership to acquire some additional partnership property? A. Yes, sir.

Q. What was that?

A. Sedona Lumber Company.

Q. Was that question of buying that additional business discussed with Joan by letters?

A. Yes, it certainly was; on the telephone and letters.

Q. You called her up and talked to her about it?

A. Yes, sir.

Q. Did you consistently during the entire time she was there keep her informed as to the partnership business affairs? A. Yes, sir.

Q. During that period of time did she continue to draw or was she entitled to go ahead drawing a portion of the partnership profit?

A. Yes, sir.

Q. I believe she did then return in the middle of November? A. Yes.

Q. And stayed in Cottonwood about until January? A. About the 19th of January. [54]

Or about the 20th of January, excuse me.

Q. Pardon me?

A. After the 20th of January.

Q. What did she do in the business during that period of time?

A. She wrote receipts. Went back to her old job, helped with the statements. We had lots to do around

(Testimony of Mattie Edens Medigovich.)

Christmas. Had to get all our customer gifts and customer cards, and she made bank deposits.

Q. I take it during that period of time she was practically full time in the business?

A. Yes, sir.

Q. Then when she went to Tempe, Mrs. Medigovich, I believe you felt that because of the closeness of Tempe to Cottonwood, she would practically spend most every week end at home?

A. We intended for her to spend every week end at home.

Q. In that period of time did she resume her old job in the business? A. Yes, sir.

Q. Over the week ends? A. Yes, sir.

Q. Did Joan ever make any recommendation to you, for instance, with respect to remodeling or matters she picked up?

A. Yes, sir. Joan talked to us about that. She thought the inside of the lumber yard was getting a little bit old. [55] After all, it had stayed the same since grandfather was there and she thought it would be nice if we called in Mr. Stanley and had the lumber yard remodeled and do a little cleaning up and painting.

Q. That was discussed as a partnership project?

A. Yes, sir.

Q. Did you pursuant to that do it?

A. She started it herself. During the time we went to the Coast she got busy and cleaned up; put any catalogues we no longer needed out of the way,

(Testimony of Mattie Edens Medigovich.)

threw away catalogues we didn't need; threw away invoices we no longer needed, and cleaned out the desk drawers, all the bookkeeping supplies.

Q. Then I take it that she had a mind of her own and pretty active? A. Very much so.

Q. And participated in the partnership as such. Do you recall whether or not in consultations you had with customers about proposed building programs or supplies needed if Joan participated?

A. Joan was very interested like I myself in house plans. Of course that was all she ever heard, was building, and she was always very interested. When somebody would bring in a plan she liked to look it over and see how it looked and how she felt the arrangement went and things of that nature. Color scheming she liked very much. [56]

Cross-Examination

By Mr. Lester:

Q. What was the object of forming this partnership, this family partnership?

A. Because the children put their own money into the business and we felt they should have their legal right to part of the business.

Q. Was there a particular tax advantage to be gained by it? A. I know nothing about that.

Q. That was all handled by Mr. Brooks?

A. Yes, sir.

Q. He handles all your tax work?

(Testimony of Mattie Edens Medigovich.)

A. Yes, sir.

Q. It was his suggestion that you form a family partnership?

A. I told Mr. Brooks, "Mr. Brooks, I only have the two children." (Witness cries.) "And I am unprotected in every way as to their legal rights to their money and they should be protected, and which way can we set this up to where they have their share and their responsibility."

Q. Do you mean to say, Mrs. Medigovich, that Billy and Joan consulted about the business matters with you and your husband?

A. Yes. We never hid anything from them because at the time I felt very much like they should know all the ropes because at some time they would be all of the business completely.

Q. In other words, you were more or less bringing them up [57] to the business? A. Yes, sir.

Q. In the business. You were educating them?

A. Yes, sir.

Q. Rather than consulting with them as to what should be done about business affairs?

A. We talked it over with them about what things should be done, because after all they had their investments.

Q. Have you told them what the problems were?

A. You didn't exactly tell them. They, of course, had minds of their own.

Q. Billy was only thirteen years.

(Testimony of Mattie Edens Medigovich.)

A. Billy was very worried when he put his money into the business. He wanted to know how his bonds accumulated interest. He wanted to be sure if he put it in the Cottonwood Lumber Company that it wouldn't sink.

Q. You don't want the Court to believe that Billy and Joan advised you and Mike how to run the business?

A. You should stay around Billy and Joan. You should have been around them. They certainly had minds of their own.

Q. Do you also suggest that when Joan was at Stanford that you consulted her as to what she thought was best in business matters while she was away?

A. Naturally my husband and I were the managers. I admit that, but we discussed all business problems with them, and we [58] were in constant contact with Joan either by mail or by phone.

Q. Was that for consultation purposes?

A. Well, we missed her very much and it was to tell her everything that was going on, naturally.

Q. You would have done that anyway whether she had any interest in the business. Wouldn't you have called her when she was away at school, the first time she went way to school?

A. Yes, sir, I certainly would have.

Q. What were her school hours before she graduated in Cottonwood from high school?

A. From 8:15 to 3:30.

Q. She attended school regularly, did she?

(Testimony of Mattie Edens Medigovich.)

A. Yes, sir.

Q. Did she ever do any home work?

A. Very little. She did some at nights.

Q. So she couldn't have done any work during the school hours and during the time she was doing home work, could she?

A. She stayed up very late at night to do home work, what she did other than the study hours at school, which she had.

Q. Can you tell us how many different jobs Joan had in 1952, the entire year?

A. The only job that she ever had, and I can't recall if that was '52, I believe it was for a little while. It was just because she knew how to run a business, in other words, adding machine, I mean the register. Those accounts she did because [59] we were very good friends and she knew how to do it, and it was her hobby, photography was her hobby at times, and so she went in the photo lab in Cottonwood so that Mr. and Mrs. Barrows could be away.

Q. That was a photo shop? A. Yes.

Q. That you say is the only job that she ever held in 1952 besides——

A. That I recall, I don't know, other than the Cottonwood Lumber Company.

Q. Did she ever work in the theatre?

A. No, I don't recall it.

Q. Did she at any time to your knowledge work in the theatre? A. Not that I remember, no.

Q. How about the bakery? A. No.

Q. Any other of those business establishments

(Testimony of Mattie Edens Medigovich.)

right near your place of business? A. No.

Q. How about Robinson's Department Store; did she work there?

A. She helped Robinson's several years back during a Christmas vacation rush.

Q. How many years ago would that be?

A. I don't recall. It would be two or three years previous. [60] I don't remember; it was only for some short time.

Q. 1949 or 1950? A. Somewhere in there.

Q. But it could not have been in 1952, you say that? A. Oh, no.

Q. Could it have been in 1951?

A. It could have probably been in 1951. It was only a very short time and it was only because of us being friends again that she helped them during their Christmas hours.

Q. How long did she work in the photo lab?

A. As I recall, Mr. Barrows could probably tell you because I don't recall just exactly how long. It wasn't very long.

Q. Can you give us some idea, a month, week, day?

A. It seemed to me like they were gone a week.

Q. When was that? A. I don't recall.

Q. What year, 1952?

A. It may have been in '51. I don't recall it was in 1952.

Q. Are you saying that as far as you know Joan worked approximately only one week in the photo shop?

(Testimony of Mattie Edens Medigovich.)

A. You mean in the whole back in 1951?

Q. During all of 1952.

A. I don't recall how long. I don't remember if it was '52. I couldn't recall if it was 1951 or 1952.

Q. Are you saying she worked there for only approximately [61] only one week during that entire year?

A. I could ask Mr. Barrows. I don't remember just exactly how long it was. It wasn't very long I know. It was just out of a friendly deal more or less because she knew how to do it.

Q. You don't know if she worked there customarily every day?

A. Oh, no, she didn't work there customarily every day.

Q. The photo shop is right next door to your place of business, two doors down?

A. Two doors, yes.

Q. Did she receive any pay from the work that she did at the photo shop?

A. I think it was more or less—I don't know what the deal was. I think that she bought a lot of film and took a lot of pictures. I think it all went in on that.

Q. As a matter of fact, Mrs. Medigovich, isn't it true that she spent a considerable amount of time in the photo shop in 1952, almost daily working and getting paid?

A. No, sir, not that I recall, no.

(Testimony of Mattie Edens Medigovich.)

Q. Is it your position she only worked about a week during 1952?

A. I couldn't say just exactly how many days it was but it wasn't very long because I had to have her at the lumber yard. It was only possibly a little while during the day.

Q. Before she graduated from high school, when did she have a chance or occasion to do any work at the lumber yard? [62]

A. After school.

Q. She gets home around 3:30?

A. Yes, sir.

Q. You close about what time?

A. About six.

Q. You are saying she would come to the lumber yard and work from 3:30 to six?

A. Well, I wouldn't say those definite hours every day. She could come in and help. She had her set duties to help me and then she spent many times in the evenings at home she would do a lot of bookkeeping.

Q. You and Mike were usually at the office, weren't you?

A. No, sir, I wasn't.

Q. Where were you, in the back?

A. Well, I was—sick leave sometimes as much as two months at a time.

Q. By the way, where were you?

A. In the hospital. I was in the hospital in Phoenix and Cottonwood.

Q. Which was that?

A. The Memorial in Cottonwood and the Good Samaritan in Phoenix.

(Testimony of Mattie Edens Medigovich.)

Q. She would come home from school and when she would come home she would do various odd duties?

A. It wasn't exactly odd jobs. She had quite a heavy load [63] in 1952.

Q. How many employees do you employ?

A. It depends. Sometimes we have extra. We have steady around six.

Q. Their hours are when to when?

A. Some of their hours are very irregular. For instance, they pay on an hourly basis.

Q. When did they report? When do these employees report for duty?

A. They are supposed to report, depending on when we need them. Sometimes they report at six o'clock in the morning to take a truck out.

Q. Is that every day? A. Not every day.

Q. Do they report for work every day?

A. Unless they are ill.

Q. Realizing there may be some times when they are ill, but excepting those instances, they do come to work every day? A. Yes, sir.

Q. Approximately what time every day?

A. The time that we come is eight o'clock. They usually come at eight o'clock.

Q. When do they quit?

A. It was supposed to be 5:30 but they never get off. It is usually six or later. [64]

Q. They generally work later? A. Yes.

Q. Those four or five or six employees you customarily employ work on a full-time daily basis?

(Testimony of Mattie Edens Medigovich.)

A. Yes, sir, an hourly pay basis.

Q. So the most Joan could have worked was an hour and a half after school? A. Sometimes.

Q. Or two hours?

A. Sometimes it amounted to much more. Around the first of the month she had her duties helping with the statements which amounted to quite a number of more hours.

Q. When did she do this work?

A. You would be surprised. We worked many nights until one or two o'clock in the morning.

Q. Did she help you like that in previous years?

A. No.

Q. Never did? A. No.

Q. Did she ever work there at all in previous years?

A. I was teaching her in previous years. I started when she was twelve.

Q. Between the time when she was twelve and 1952 what kind of duties did she have?

A. She didn't have exactly duties in those days because [65] it was only duties to me then.

Q. She was helping you, wasn't she?

A. Along with my teaching her.

Q. What was she doing?

A. She wasn't as capable at first.

Q. What was she doing?

A. I taught her to add columns, taught her to figure footage; taught her to write receipts; and she took telephone calls.

(Testimony of Mattie Edens Medigovich.)

Q. Between the time when she was twelve and 1952?

A. Yes, sir. But her duties were much more in '52.

Q. Naturally as she got older she learned a little more, isn't that right?

A. I wouldn't say that; she was very capable.

Q. So that there was no substantial change when she became a partner?

A. Yes, there was; there certainly was. As far as Joan was concerned, when she became a partner her money was invested in the business and she was part of the business.

Q. She received an income? A. Yes, sir.

Q. How much?

A. Well, she received, she was drawing \$200.00 a month, but at the end of the fiscal year it was all figured up. In other words, the profits were divided accordingly and she had her share of the profits in the business. [66]

Q. Her profits were predicated on the amount of her investment? A. Yes, sir.

Q. You say she left Stanford—left September 27th and returned November 16, 1952?

A. Somewhere in that area. I don't remember exact dates.

Q. When she returned in November of 1952 what did she do? A. She was in the hospital.

Q. For you remember how long?

A. Close to a week.

Q. In Cottonwood?

A. In Cottonwood.

(Testimony of Mattie Edens Medigovich.)

Q. After she left the hospital did she convalesce or anything?

A. No, sir, she started helping me in the business.

Q. Did she work anywhere else after getting out of the hospital? A. No, sir.

Q. So she remained in Cottonwood until January 20th? A. The 20th.

Q. Of '53? A. Yes.

Redirect Examination

By Mr. Wilmer:

Q. You told of talking with Joan by telephone and discussing these matters. Counsel asked if you wouldn't have called her [67] anyway even if she hadn't had a financial stake in the business. If she hadn't had the financial stake in the business as a partner would you have discussed the business affairs of the partnership with her? A. No, sir.

Mr. Wilmer: That is all.

The Court: Perhaps we should take our noon recess at this time until 1:30.

(Whereupon the Court recessed until 1:30 o'clock p.m.)

July 29, 1954—1:30 o'Clock P.M.

MICHAEL MEDIGOVICH

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Wilmer:

Q. Mr. Medigovich, you are the husband of the lady who just testified? A. Yes, sir.

Q. You have lived in Cottonwood for many years? A. Yes, sir.

Q. In order not to take a lot of unnecessary time, Mike, I am just going to ask some brief questions. You were here and heard your wife testify as to the organization of this partnership and the source of the funds that went into it? [68]

A. Yes, sir.

Q. Is that your testimony? A. Yes, sir.

Q. Prior to the time when the partnership was formed, Mike, did Joan and Billy also spend some time in the business; did they work around the place as kids? A. They were around.

Q. After the partnership was formed did they take a greater interest in or devote more time to the partnership? A. Yes, sir.

Q. When did Joan graduate from the high school in Cottonwood? A. May, 1952.

Q. That was in May, 1952? A. Yes, sir.

Q. Then she was home from May of 1952, until I believe the latter part of September of 1952?

A. Yes, sir.

(Testimony of Michael Medigovich.)

Q. During that period, Mr. Medigovich, how much time did she spend in the business there at Cottonwood? A. She was there every day.

Q. Did she devote a substantial part of her time after that to the business? A. Yes, sir.

Q. This continued through this entire period from her graduation in May until she left for Stanford in September? A. Yes, sir. [69]

Q. You have heard your wife's statement as to the work she did in the partnership, that is, the matter of taking receipts, sending out bills, banking, bookkeeping, and so on. Is that your recollection? A. Yes, sir.

Q. Your wife said something, Mike, with respect to the fact that many times they worked at night. Do you have recollection of that? A. Yes, sir.

Q. How often and how late at night did they work?

A. How often I couldn't say but it would be sometimes as much as two or three times in a month.

Q. In other words as distinguished from employees, the partners' hours were such as required to take care of the business? A. That is right.

Q. With respect to the matter of contractors and others coming in at other than regular business hours, who besides yourself and your wife had keys to the lumber yard?

A. Joan had keys. She could open up for anybody she knew.

Q. Did she do that, to your knowledge, quite frequently? A. Quite often.

(Testimony of Michael Medigovich.)

Q. I take it that by reason of your location and the fact that people aren't able to get in during regular hours, you have quite a volume of off-hour work or sales, I should say? [70] A. Yes, sir.

Q. From the time when Joan came home from Stanford and after she returned from the hospital and until she left, I believe the 20th of January, did she devote substantially all of her time to the partnership? A. Practically.

Q. Doing what was necessary and what she did she did for the partnership? A. That is right.

Cross-Examination

By Mr. Lester:

Q. Joan wasn't in any sense of the word a full-time employee, was she, Mr. Medigovich?

Mr. Wilmer: We object to that on the ground that a full-time employee as contemplated by the contract is different from a partner or a partner who is a full partner.

The Court: I think he should tell what she did. That may be a question for me.

Q. Let me rephrase and ask the question this way, Mr. Medigovich. She obviously wasn't working full time or on a full-time basis during any time in 1952?

Mr. Wilmer: I object to that on the ground that a partner as such occupies a completely different relationship than an employee, and you can't say a partner is working full time or part time. That

(Testimony of Michael Medigovich.)

isn't the language that is applied to a partnership organization and business. I have no objection to his examining fully and in detail as to everything she did [71] and leave it up to the Court.

The Court: I think that is what we should do. That is the thing that will mean something to me. What she actually did.

Mr. Lester: Mr. Wilmer's objection is based upon his personal construction of the policy and my question is based upon the construction I think is correct and I don't see that the question is objectionable. She either worked full time or she did not.

The Court: My point is this: If she says she was or wasn't, that doesn't mean anything to me. If you have him tell how much of the day or on the average how much of the day she put in and what she did, then I will have some conception of it, but when you ask him if it was full time and if he says yes or no, I don't know if he means twenty-four hours, if he means a good part of the day or what. I think we ought to stick with the facts, what she actually did. That will be the most informative to me.

Q. (By Mr. Lester): You had, I understand, five or six employees at your place of business customarily, is that correct? A. That is right.

Q. They would put in a full day, is that right, every day? A. Yes, sir.

Q. That would be usually more than an eight-hour day? A. I beg your pardon? [72]

Q. Usually would that entail more than eight hours for each man? A. Yes.

(Testimony of Michael Medigovich.)

Q. How many hours would you say that Joan averaged? A. She usually averaged——

Mr. Wilmer: If the Court please, I am a full-time partner and I am working as a partner all of the time, even though I may be 100 miles from the office. It is the same way with this man. We have no objection as to when she got there, but it is for the Court to say if she was working full time as a partner.

The Court: I take it the question is how many hours a day she put in.

Mr. Wilmer: We have no objection.

A. She averaged at least five or six hours every day.

Q. Every day of 1952?

A. No. You asked me from the time she came home from school.

Q. You mean after 3:30 in the afternoon?

A. The way I understood your question was how many hours she put in after she got back home from Stanford?

Q. No. During 1952, Mr. Medigovich, on the average how much time did she put in doing work for the business per day?

A. That would be pretty hard to say how much, at least a couple of hours she got in every day. [73]

Q. On the days she did no work? A. Yes.

Q. There were a number of times, weren't there, Mr. Medigovich, when she had social activities she was interested in and would participate in with her friends?

(Testimony of Michael Medigovich.)

A. I can't recall too closely about it but I suppose there were.

Q. For example, she probably went swimming in the summertime a little bit, didn't she? Wouldn't she go swimming on occasions?

A. Yes.

Q. Horseback riding?

A. Some.

Q. Parties?

A. Sure.

Mr. Lester: That is all.

Redirect Examination

By Mr. Wilmer:

Q. Mr. Medigovich, I presume you went to parties sometimes?

A. I sure do.

Q. You are away from the business for recreational purposes at times?

A. Yes.

Q. The amount of time which Joan devoted to the business which was such as required to discharge her assigned duties?

A. That is right. [74]

Q. Did you attempt to keep any track of the times in the evenings and Sundays and Saturday afternoons, if you were closed when she would go open the business and sell merchandise?

A. They were too numerous to mention.

Q. You made no effort to keep track of the hours you or your wife or son and daughter put in the business?

A. No.

Q. While she was there she was on call at all times if she was required in the business?

(Testimony of Michael Medigovich.)

A. That is right.

Q. When you were gone she runs the office in complete charge?

A. Yes.

Recross-Examination

By Mr. Lester:

Q. You were devoting your full time to the business, were you not?

A. Yes, I had no other business.

Q. You weren't employed, or did you run any other business? You didn't work at the photo lab part time?

A. I wouldn't say I did.

The Court: You answered a question about the average length of time that Joan put in in this clerical work in the business. As I get the picture there are different stages in the year 1952. Confining yourself now to the time in 1952 when she was still in high school—— [75]

A. Yes.

The Court: How much time on the average per day did she give to this work in the lumber yard?

A. She gave about, somewhere in the neighborhood of two hours.

The Court: Then, when she got out of high school and in the summertime, between the time when she got out of high school and when she went to Stanford, how much time did she put in in the work in the lumber yard?

A. The biggest part of the day, which would run five or six hours some days, depending on how much work there was.

(Testimony of Michael Medigovich.)

The Court: I believe you testified that between the time she returned from Stanford and went to Tempe, and after she got out of the hospital, how much time was it you said she spent in that period?

A. Around five or six hours every day.

K. NORTON

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Wilmer:

Q. Mr. Norton, would you state your name for the record? A. K. Norton.

Q. You are an attorney at law?

A. Yes. [76]

Q. Practicing at—— A. Cottonwood.

Q. How long have you been there, Mr. Norton?

A. Upwards of twenty years.

Q. I take it you are well acquainted with folks up there? A. I think I know most everyone.

Q. You know Mr. and Mrs. Medigovich?

A. Oh, yes.

Q. Did you do the legal work for the Cottonwood Lumber Company, Mr. Norton?

A. A lot of it, yes.

Q. You are familiar then with the time when J. F. Edens sold his interest in the partnership and retired from it? A. Yes.

Q. I presume you are familiar with the circumstances of Joan and Billy Medigovich coming into

(Testimony of K. Norton.)

the partnership? A. I am.

Q. Were you consulted with respect to that, Mr. Norton? A. Yes, sir.

Q. Did you advise them with respect to the formation of the partnership and what it entailed and so on? A. Yes.

Q. Did you have any discussions with Mr. and Mrs. Medigovich and the two younger Medigoviches as to how a partnership worked and the responsibilities, and so on? [77] A. Yes.

Q. Were you commissioned to draw a partnership agreement?

A. I suppose that is what you would call it.

Q. I believe you have made a search the last few days, Mr. Norton, to see if you could find the final form that that partnership was reduced to?

A. I have.

Q. But you have been unable to locate it?

A. That is right.

Q. Do you recall that there was such a partnership agreement prepared? That it was in form for execution?

A. As far as the partnership contract is concerned, we started at one time to draw such an instrument and then we had the question of how we were to figure in the partnership agreement, just exactly what interest the two children had.

Q. What their percentage of the profits would be? be?

A. Yes; and we held that while the auditor tried

(Testimony of K. Norton.)

to figure out some way to get it set up so he could tell me just exactly what the figure was.

Q. So that the auditor never having come forward with that figure, you never did complete the form of partnerships?

A. There was a rough draft form of the partnership agreement, I recall distinctly, however, I don't remember ever signing one.

Q. But there definitely was a partnership set up? [78]

A. There was a partnership agreement between the parties.

Q. Do you recall in that connection what the agreement was as to what Joan Medigovich and Billy Medigovich were to do in the partnership?

A. There was quite a discussion about that. It was finally understood in the discussion that they would work when they weren't going to school or had some activity that would keep them from it. They were to take a part in the partnership and work at it.

Q. In other words, they gave regular recognition to the fact that one was twelve or thirteen and the other sixteen or seventeen?

A. Those things were considered, yes.

Q. I presume, Mr. Norton, you yourself had occasion to be around the Cottonwood Lumber Company?

A. Nearly every day.

Q. Did you notice Joan there subsequent to this partnership agreement?

A. Many, many times.

(Testimony of K. Norton.)

Q. Did you observe what she was doing?

A. She was usually working at the desk. I have seen her taking money. I have seen her wait on trade; in fact, I bought some things when she waited on me at the Cottonwood Lumber Company. I have seen her working at the desk, running an adding machine, calculator, whatever they have there. [79] She was just working in the office like anyone else would work.

Q. Your observation then would be to the effect that she was working pretty steadily at her job when she wasn't in school?

A. Yes, that is right.

Cross-Examination

By Mr. Lester:

Q. Do you know if she worked anywhere else, Mr. Norton?

A. I saw her one day I think at one time while in the photo lab. She was in there and she was the only one there.

Q. Was she working there then?

A. I suppose she was.

Mr. Lester: That is all.

Redirect Examination

By Mr. Wilmer:

Q. That is one day? A. Yes.

Recross-Examination

By Mr. Lester:

Q. Were you in there on other occasions?

A. I don't recall being in there but I go by nearly every day.

(Testimony of K. Norton.)

Q. You had a number of occasions to go to the Cottonwood Lumber Company?

A. I have been in there quite a number of times, yes.

Q. She wasn't in there every day that you were there?

A. No, she wasn't there each time I have been there. [80]

TONY STADELMAN

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Wilmer:

Q. Will you state your name, please?

A. Tony Stadelman.

Q. Where do you live? A. Cottonwood.

Q. What is your business?

A. Building contractor.

Q. How long have you lived there?

A. About 32 years in Cottonwood.

Q. How long have you been in the contracting business? A. About 10 years.

Q. That is the past ten years? A. Yes, sir.

Q. That would carry you in the business through 1952, that is, you were in that business in 1952?

A. Yes, sir.

Q. Are you acquainted with Mr. and Mrs. Medigovich? A. Yes, sir.

Q. Do you have occasions in your business of

(Testimony of Tony Stadelman.)

contracting to trade at the Cottonwood Lumber Company? A. Yes, sir, the biggest part.

Q. You were acquainted with Joan Medigovich? [81] A. Yes, sir.

Q. Tell me, do you have occasion to go to the lumber yard at other than regular business hours?

A. Yes, sir, I do.

Q. Why is that?

A. The biggest part of my work is out in the country and I don't get into town until after they are closed, so I go up to the house and if Mike and Mattie aren't up there, Joan or Billy would take care of me.

Q. They would open the yard and supply you with what you needed?

A. Open the yard and take care of me.

Q. During the year 1952 did you have occasion to be at the Cottonwood Lumber Company with some regularity? A. Almost every day.

Q. For business purposes I take it?

A. Yes, sir.

Q. You observed, Mr. Stadelman, whether or not Joan was usually there when you were there?

A. She was there most of the time when I was there because I always came in in the evenings.

Q. What would she be doing?

A. Working at the desk, helping her mother, or wait on me at times.

Q. Do you know the time when she obtained a partnership [82] interest in the business?

(Testimony of Tony Stadelman.)

A. Yes, sir.

Q. Was that pretty generally known at Cottonwood?
A. I believe it was.

Q. It was pretty generally known the time when the children became partners?
A. Yes, sir.

Q. I take it in a community such as Cottonwood you are all very friendly and much more concerned with one another's personal doings than in a larger place?
A. Yes, sir.

Mr. Lester: No cross-examination.

NORMAN FAIN

called as a witness herein, having been first duly sworn, testified on his oath as follows:

Direct Examination

By Mr. Wilmer:

Q. State your name, please.

A. Norman Fain.

Q. I believe you have a ranch at Dewey?

A. Yes, I do.

Q. That is not very far from Cottonwood, is it?

A. About 35 miles.

Q. You have occasion to trade some in Cottonwood?

A. We carry an account there all of the time. [83]

Q. That is at the Cottonwood Lumber Company?

A. At the Cottonwood Lumber Company.

Q. Was that true in 1952?
A. Yes.

Q. I take it then you are acquainted with Mr. and Mrs. Medigovich and Joan and Billy?

(Testimony of Norman Fain.)

A. Quite well.

Q. How long have you known them?

A. I knew the Medigoviches since the early 30's; I guess Joan and Billy since they were just babies.

Q. You then knew of the time when Edens retired from the business, that is the father?

A. Yes.

Q. And of the partnership that existed between Mike and his wife and her brother J. F.?

A. Yes.

Q. Then did you learn of a change because J. F. Edens had withdrawn and Joan and Billy had become partners?

A. Yes, we discussed that to some extent at the time.

Q. That was something you were interested in because you had known the family quite awhile?

A. Yes.

Q. And you were interested in the children's going into the business?

A. Yes. [84]

Q. How often would you say, Norman, you had occasion to be at the Cottonwood Lumber Company on the average through 1952?

A. I would say from month to month, twice a week.

Q. Did you have occasion when you were there to observe what Joan was doing in the business as a part of the business?

A. On a good many occasions, yes.

Q. What did you observe?

A. I observed her working at the desk. I had

(Testimony of Norman Fain.)

lunch with her parents at different times and she would keep the office open while we were at lunch. I remember one or two occasions when after hours she sold me small purchases or things that had been forgotten, or that I needed due to the fact that I lived so far away. They were nice about opening up after hours for anything we might need; any of their family.

Q. The observations you made then was that Joan was pretty active in the business?

A. Yes, during the time she wasn't in school.

Cross-Examination

By Mr. Lester:

Q. Did she appear to have regular hours?

A. I wouldn't know about that because I was just there on occasions.

Mr. Lester: No further questions.

Mr. Wilmer: That is all. [85]

ERSEL GARRISON

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Wilmer:

Q. State your name, please.

A. Ersel Garrison.

Q. Mr. Garrison, do you reside in Cottonwood?

A. Yes, sir.

Q. How long have you lived there?

(Testimony of Ersel Garrison.)

A. Since 1919.

Q. What is your business?

A. Automobile business.

Q. You have been in Cottonwood since 1919?

A. Yes, sir.

Q. I take it then you were well acquainted with Mr. Edens when he ran the Cottonwood Lumber Company and his daughter, Mrs. Medigovich?

A. Yes, sir.

Q. And have been quite familiar with the family and the business activities in the Cottonwood Lumber Company?

A. Yes, sir.

Q. For the record, Mr. Garrison, what is the approximate population of Cottonwood?

A. Approximately 2,000.

Q. It is located where with respect to Clemenceau? [86]

A. Clemenceau is to the south of Cottonwood about a mile and three-fourths.

Q. Cottonwood is how far from the highway crossing the Verde River? How far on to the northeast?

A. Three miles.

Q. It is on the highway that runs from Jerome through Rock Creek Canyon to Flagstaff?

A. On Highway 89A.

Q. The Jerome-Flagstaff-Sedona highway and so forth. Did you learn of the retirement of Mr. Edens, Mrs. Medigovich's father, from the business?

A. Yes, sir.

Q. You knew when that took place. Did you also know of the partnership that existed between Mr.

(Testimony of Ersel Garrison.)

and Mrs. Medigovich and her brother, J. F. Edens, for a time? A. Yes, sir.

Q. Did you know of the termination of that and the formation of the new one? A. Yes, sir.

Q. How did you learn of the formation of the new partnership between Mr. and Mrs. Medigovich and Joan and Billy, if you recall?

A. I don't recall just how, but it was, I think it was, I recall Mr. Medigovich told me there was a change.

Q. It was a well-known fact in the community that the [87] children had come into the business?

A. Yes, sir.

Q. Did you have occasion during 1952 to be at the Cottonwood Lumber Company from time to time?

A. We do business with the Cottonwood Lumber Company most every day in the conduct of our business in buying supplies and materials, likewise we sell the Cottonwood Lumber Company trucks and perform services; so there is almost a continuous business connection there almost daily.

Q. You service their automotive equipment?

A. Yes, sir.

Q. After the partnership was formed in February or March, 1952, did you notice how much time Joan spent in the business there?

A. No, I didn't, only that she was often there when I called for something.

(Testimony of Ersel Garrison.)

Q. Did you know, or did you notice what she was doing?

A. Just the ordinary work in the office.

Q. Did she on occasion wait on the trade?

A. Yes, sir.

Q. Did you ever have occasion to go there after hours?

A. We don't operate our business; it isn't necessary.

Q. You close up and you would have no occasion because you are in town? A. Yes, sir. [88]

Q. Could you tell me, Mr. Garrison, how often that you would notice Joan there through the summer of 1952 when she was through with high school? Was she there substantially all the time as far as you recall? A. Yes, sir.

Q. Was she a pretty enterprising, energetic sort of girl? A. Very much.

Q. She was right busy in there when you were there? A. All the time.

Cross-Examination

By Mr. Lester:

Q. Did you notice her there at any other time besides the summer of 1952?

A. Yes. The girl had grown up there.

Q. I mean in the business. Did you notice her in the office? A. Yes.

Q. When? A. Well, all—for a long time.

Q. What time of the day?

A. Well, that would vary; maybe on Saturdays.

(Testimony of Ersel Garrison.)

Q. How about during the week?

A. Well, that would all depend on what time of day I would go in.

Q. What time of day would you see her usually except in the summer?

A. Well, it would be in the daytime. [89]

Q. In the morning?

A. I don't recall of paying any attention of what time of day it was.

Q. Do you realize that she was in school?

A. Yes.

Mr. Lester: That is all.

Mr. Wilmer: That is all.

JOHN M. FAIRFIELD

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Wilmer:

Q. What is your name?

A. John M. Fairfield.

Q. Mr. Fairfield, you reside in Cottonwood?

A. I reside in Glendale. I have a place of business in Cottonwood.

Q. You drive back and forth every day?

A. That is right.

Q. What is your employment?

A. Manager of the Cottonwood branch of the Bank of Arizona.

Q. How long have you been in that business?

(Testimony of John M. Fairfield.)

A. I have been manager of the Glendale office since 1951, and we moved our office to Cottonwood on January 25th of this [90] year.

Q. Did you have a branch in Cottonwood prior to this time? A. We had a facility.

Q. That is a place where people could make deposits and cash checks? A. That is right.

Q. Was the Cottonwood Lumber Company a customer of your bank? A. Yes.

Q. Did you know Joan Medigovich?

A. Yes.

Q. Did you have occasion to have financial statements rendered or given to you by the Cottonwood Lumber Company? A. We did.

Q. Do you recall such a financial statement being delivered or given to the bank in 1952?

A. I have one dated August 31, 1952.

Q. Do you recall what that showed with respect to who the owners of the Cottonwood Lumber Company were? A. Yes.

Q. What does that show?

A. It shows Mr. and Mrs. Medigovich and Billy and Joan as partners under the capitalization.

Q. In the ownership? A. Yes. [91]

Q. Do you recall, Mr. Fairfield, whether or not—were your duties such—that you would know whether or not Joan made deposits in the bank from time to time?

A. I have seen her make them. I have taken them from her.

Q. That is for the partnership? A. Yes.

(Testimony of John M. Fairfield.)

Q. Did you have occasion to be at the Cottonwood Lumber Company many times?

A. On rare occasions.

Cross-Examination

By Mr. Lester:

Q. You wouldn't know what her activities were then?

A. No, I would not.

Mr. Lester: That is all.

ERNIE BROUGHTON

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Wilmer:

The Court: All witnesses may be excused after they have testified unless counsel asks them to remain.

Q. (By Mr. Wilmer): Mr. Broughton, state your name for the record.

A. Ernie Broughton.

Q. Mr. Broughton, where do you live?

A. Cottonwood, Arizona. [92]

Q. How long have you lived there?

A. About twenty-five years.

Q. What is your business?

A. Building contractor.

Q. Were you in that business in 1952?

A. Yes, sir.

Q. Did you have occasion to do business with the

(Testimony of Ernie Broughton.)

Cottonwood Lumber Company? A. Yes, sir.

Q. For how long?

A. I have done business with them since about 1934.

Q. I presume then you have been quite familiar with the ownership and the operation of that business? A. Yes, sir.

Q. You trade with them a lot? A. Yes.

Q. Did you know, Mr. Broughton, of the fact that Joan and Billy had bought into the partnership in the spring of 1952? A. Yes, sir.

Q. How did you learn of that, if you recall?

A. Pardon?

Q. Do you recall how you learned of that?

A. I believe I made the inquiry when Mattie's brother left.

Mr. Lester: We do not contest the fact that she was a partner. We are only contesting that she wasn't an active [93] partner and also the fact that she was not an employee in the sense of that word used and defined. I don't see where it makes any difference if he knew about the partnership or not. We concede she was a partner.

Mr. Wilmer: Very well. With counsel's statement I will limit testimony.

Q. (By Mr. Wilmer): Did you have occasion to observe from time to time the work that Joan did around the lumber yard? A. Yes.

Q. How frequently did you observe it?

A. After nearly every evening. I never got to go

(Testimony of Ernie Broughton.)

in the lumber yard in the day, but in the evening if I got in after they closed she was often in the office and would assist in any of my requirements, and if I didn't get in I would sometimes call and she would answer and take my order by phone; and I have gone after they closed in the evening and nobody was home and have gotten the keys from her to get material and left them with her.

Q. Did you say you generally didn't get to the lumber yard until late in the afternoon or evening?

A. That is right.

Q. You wouldn't know in the summer of 1952 how much time she spent in the morning there?

A. No, I wouldn't.

Q. Your observation is practically limited to every time [94] in the evening when you would go there she would be at the place of business?

A. That is right.

Q. And that when it was closed she would have the keys and would open up for you?

A. Yes.

Cross-Examination

By Mr. Lester:

Q. I believe you said she was often there; wasn't that the word you used rather than practically every time?

A. I didn't get in every night. Lots of nights I didn't go in so I wouldn't know if she was there or not, but when I did go in that summer she was practically there all the time.

JOE STARKEY

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Wilmer:

Q. You are Joe Starkey? A. Yes, sir.

Q. Mr. Starkey, where do you live, sir?

A. Cottonwood.

Q. How long have you lived there?

A. I have lived there about since World War II and I was in there at the beginning of World War II. I established a residence there but went in the Service and came back after [95] the Service.

Q. What is your business?

A. Contracting, painting and decorating.

Q. As such, do you have occasion to do business with the Cottonwood Lumber Company?

A. Yes.

Q. Did you have occasion to do business with them in 1952? A. Oh, yes.

Q. Were you acquainted with Joan Medigovich?

A. Yes, I knew her.

Q. How often did you have occasion to go to the Cottonwood Lumber Company?

A. There are mighty few days I don't go in at all.

Q. Buying or other similar activities?

A. Yes.

Q. Through 1952, did you observe how much time, or did you observe her when you were in there, if Joan was or was not there?

(Testimony of Joe Starkey.)

A. Yes, she was there most all of my trips. She was there in the evenings. After we would get through with a job we would come in. She was usually always there.

Q. Making preparation for the next day's work?

A. Yes.

Q. What would she be doing, Mr. Starkey?

A. Well, now, she was usually in the office but she waited [96] on me sometimes as late as nine o'clock at nights. When I would come in from Flagstaff or Williams or some place out of town I would call her to come and open the business so we could get the materials out for the next day.

Q. Was she quite often the one that would take care of you when you came in after hours?

A. She usually waited on me after hours. When Mike was there he would take care of me, but they were usually gone in the evenings. In the evenings she usually always took care of the business.

Mr. Lester: No cross-examination.

IMOGENE PENDERGRASS

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Wilmer:

Q. Will you state your name, please?

A. Imogene Pendergrass.

Q. Where do you live? A. Bridgeport.

Q. Where is that with respect to Cottonwood?

(Testimony of Imogene Pendergrass.)

A. About three miles south and east of Cottonwood.

Q. How long have you lived there?

A. Since '46.

Q. Are you acquainted with the Cottonwood Lumber Company [97] and the folks that run it?

A. Yes, I am.

Q. Did you ever work there? A. Some.

Q. Did you work there in 1952?

A. A little.

Q. What work did you do?

A. Just clerical.

Q. Did you know Joan Medigovich?

A. Yes, I did.

Q. Was she there when you were working there?

A. Yes.

Q. What duties did she perform while you were there?

A. Well, she waited on the customers and does the usual clerical work.

Q. Did she have any more authority than you did? A. Certainly.

Q. What was that?

A. I mean with money she can do things, or get money and do that. I don't assume anything like that.

Q. You knew she was one of the owners?

A. Certainly.

Q. Did she have authority to open and close the business? A. Yes, she did.

(Testimony of Imogene Pendergrass.)

Q. Would you be there sometimes when Mr. and Mrs. Medigovich [98] would be away?

A. Some.

Q. When they were away who ran the business?

A. Joan it could be if she was there, yes.

Cross-Examination

By Mr. Lester:

Q. When did you go to work at the Lumber Company?

A. I don't really remember. I just helped there off and on in a friendly sort of way; when Joan couldn't be there or was at school or something I might help out, or something.

Q. Were you there in the summertime of 1952?

A. Very little.

Q. You were there? A. Yes, some.

Q. How did you know when to go to work?

A. Mattie called me up or I stopped in, and if there was anything I could do I would do it.

Q. They would call you in advance of the following day? A. Generally the same day.

Q. Would you then go to work at various times?

A. Various, there were no set times.

Q. Sometimes in the morning and sometimes in the evening? A. Yes.

Q. Was Joan there each time you were there?

A. Not always.

Q. Didn't you say the reason for your going to work was [99] to substitute for Joan when she couldn't be there?

(Testimony of Imogene Pendergrass.)

A. Partially it could have been.

Q. Then she couldn't have been there if you were substituting for her.

A. Not always, but then I didn't substitute for her all the time.

Q. Did she work anywhere else?

A. Well, not that I know definitely.

Q. What do you mean definitely?

A. She may have helped out at the photo lab a little, but a very little, and I wouldn't know any definite dates.

Mr. Lester: I think that is all.

Mr. Wilmer: That is all. The plaintiff rests, your Honor.

Motion For Judgment

Mr. Lester: For the record, I think I might at this time make a brief motion for judgment at this point for the reason that the evidence fails to establish, Number One: That the decedent was an active partner; and Number Two: That even if she were, the evidence fails to show that she was active on a full-time basis; and finally for the third reason: That in any event, the insurance, if there was any in the first instance, became terminated when the evidence shows she left for Stanford and was away for more than 31 days, there being no evidence of any option having been exercised as provided by the policy. [100]

The Court: The motion will be denied.

Mr. Lester: I will call Mr. Don Barrows.

DON BARROWS

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Lester:

Q. Your full name, Mr. Barrows?

A. Donald C. Barrows.

Q. You reside where?

A. I beg your pardon?

Q. Where do you live?

A. I reside in Glendale and work in Cottonwood.

Q. How long have you lived in Glendale?

A. Just three years.

Q. Glendale is approximately how far from Cottonwood?

A. Two and one-half miles.

Q. Do you own a business in Cottonwood?

A. I do.

Q. What is the name of that business?

A. Photo Lab.

Q. Where is that located with reference to the Cottonwood Lumber Company?

A. About three doors south on that street.

Q. On the same side of the street? [101]

A. Yes.

Q. How long have you known the Medigovich family?

A. Three years.

Q. By the way, you received a subpoena, did you not, to appear here?

A. Yes, I did.

Q. That was Mr. Wilmer who subpoenaed you. Do you have that subpoena?

(Testimony of Don Barrows.)

Mr. Wilmer: If the Court please, if counsel is interested, I think the record will show that he issued a subpoena for Mr. Barrows and we issued a subpoena for Mr. Barrows.

Q. When did you first meet Joan Medigovich; when did you first know her?

A. When we purchased the shop in Cottonwood.

Q. When you first came to Cottonwood and Glendale you purchased the photo lab?

A. We worked on it actually before we moved to Cottonwood, but the deal was completed approximately the first of August.

Q. That was August, 1951? A. Yes.

Q. What was the occasion of your coming in contact with Joan Medigovich? How did you meet her?

A. She had been working for the former owner of the shop.

Q. She had been working in the photo lab for the proprietor before you bought it? [102]

A. She had been helping Mr. Blasdale.

Q. When you took over, did that relationship continue; did she continue to work at the photo lab?

A. For I would say probably about a week's time immediately after we purchased the shop.

Q. That was in August, 1951? A. Yes.

Q. Did she ever again work there?

A. Off and on, yes.

Q. I talked with you yesterday about the thing?

A. Yes.

(Testimony of Don Barrows.)

Q. Do you remember what you told me yesterday?

Mr. Wilmer: I object to this type of examination. He called the witness. The question is did he talk with him yesterday.

The Court: Objection sustained.

Q. Did she work for you in 1952?

A. I believe there were a couple of occasions, were times when we called the lumber yard to see if she could come in for an hour or two.

Q. Just a couple of occasions?

A. I beg your pardon?

Q. Just a couple of occasions?

A. Well, it couldn't have been too many in '52 because during the summer our business is naturally slow but I believe [103] the occasions I am referring to was the latter part of '52.

Q. Mr. Barrows, didn't you tell me yesterday in answer to a question by me that she worked nearly every day in 1952 in your business and you paid her by the hour. Didn't you tell me that yesterday?

Mr. Wilmer: Counsel is cross-examining his own witness.

Mr. Lester: I believe I have a right to under the circumstances.

Mr. Wilmer: There is nothing that would indicate that occasion for cross-examining Mr. Barrows. He doesn't appear to be hostile.

Mr. Lester: I believe he does.

The Court: I am going to let it stand. I take it counsel is facing surprise.

(Testimony of Don Barrows.)

Mr. Lester: Yes, I am.

The Court: Read the question.

(The last question was read by the reporter.)

A. If I did, I don't remember because that wouldn't be possible.

Q. Didn't you tell me that during the school, when she was still in high school she would come and report for work at your photo lab almost every day after school?

A. I couldn't have said every day.

Q. Almost every day you told me, isn't that a fact?

A. No, it couldn't be almost every day. [104]

Q. I am not asking what it could have been. I am asking if you didn't tell me that yesterday?

A. I don't remember.

Q. Didn't you tell me that during the summer she worked almost every day at least half a day and divided her time between the lumber yard and your shop?

A. In 1952 after Joan came home from school and came out of the hospital she used to come in around noontime.

Q. I am talking about the summer of 1952 and I will come to later in the year in a few moments.

A. In the summer of '52 and that of lunch hours and possibly an hour or two in the afternoon, but not every day.

Q. But didn't you tell me she did that usually every day?

A. I couldn't have.

Q. Did you?

A. No.

(Testimony of Don Barrows.)

Mr. Wilmer: Counsel has asked the question and the witness has answered.

The Court: It has been answered.

Q. Then she went to Stanford and after she came back she returned to work in the photo lab?

A. She helped out a few times after she came back from Stanford.

Q. Didn't you tell me yesterday she worked almost every day until she went to Phoenix to enroll in the college? [105]

A. I didn't say nearly every day.

Q. You did say nearly every day.

A. I said she was a big help and helped numerous occasions but I didn't say every day.

Mr. Wilmer: I take it she was quite interested in photography? A. Yes, sir, she was.

Mr. Lester: Did she wait on customers while she was there? A. Yes, she did.

The Clerk: Defendant's Exhibit A for identification.

Mr. Lester: I offer in evidence Defendant's Exhibit A for identification, which is a certified photostatic copy of the death certificate.

Mr. Wilmer: No objections. I don't see any point in it. The pleadings admit the issuance of the policy and admit the filing of the claim.

The Court: Isn't that true?

Mr. Lester: Under the law, as I understand it, the facts stated in the death certificate are prima facie evidence of the facts stated therein.

(Testimony of Don Barrows.)

Mr. Wilmer: I still say there is no materiality in it, your Honor.

Mr. Lester: The photostatic copy of the death certificate gives her occupation and her business at the time of her [106] death.

Mr. Wilmer: We certainly object to it that there is any evidence whatsoever of what her occupation was or what her address was at the time of her death. The case which counsel is requesting doesn't go to that extent at all. If that is the purpose of it, we object to it on the ground it is of no evidentiary value.

The Court: It may go in. I will look at it later.

Mr. Lester: I just want to point out the two——

Mr. Wilmer: If this is going to be argued——

Mr. Lester: This is not going to be argued. I am going to read the line in question to save time. I think I have a right.

The Court: Let counsel proceed.

Mr. Lester: Line 9-A which calls for the usual occupation, states the word "student," and under 9-B, which calls for the kind of business or industry, the word "college" appears.

I think the defendant will rest. I have nothing more.

(Discussion as to the submission of the case and the time for submission of [107] memoranda.)

State of Arizona,
County of Pima—ss.

I, Myron O. Stolle, do hereby certify that I am an official Court Reporter in the United States District Court, District of Arizona, and that as such official Court Reporter I attended the trial in the foregoing entitled cause; that I took down in shorthand all the oral testimony adduced and proceedings had; that such shorthand was reduced to writing under my supervision and the foregoing 107 pages of typewritten matter contain a full, true and correct transcript of my shorthand notes taken by me aforesaid.

Witness my hand this 8th day of February, 1955.

/s/ MYRON O. STOLLE,
Official Court Reporter.

[Endorsed]: Filed February 9, 1955. [108]

In the District Court of the United States
for the District of Arizona

CERTIFICATE OF CLERK

United States of America,
District of Arizona—ss.

I, Wm. H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of Mattie Edens

Medigovich, Plaintiff, vs. Pacific Mutual Life Insurance Company, a corporation, Defendant, numbered Civil 384 Prescott, on the Docket of said Court.

I further certify that the attached and foregoing original documents bearing the endorsements of filing thereon are the original documents filed in said case, and the attached and foregoing copy of the Civil Docket entry and minute entry are true and correct copies of the originals thereof remaining in my office in the City of Phoenix, State and District aforesaid.

I further certify that said original documents, and said copy of the Civil Docket entry and of the minute entry, constitute the record on appeal in said case, as designated in the Designation of Contents of Record on Appeal filed therein and made a part of the record attached hereto, and the same are as follows, to wit:

1. Plaintiff's Complaint.
2. Petition for Removal and Notice of Removal.
3. Defendant's Answer.
4. Plaintiff's Memorandum.
5. Defendant's Memorandum.
6. Plaintiff's Reply Memorandum.
7. Court order entered December 28, 1954, at Tucson and in the Civil Docket on December 30, 1954, ordering judgment for the defendant and against the plaintiff.
- 7a. Civil Docket entry showing judgment en-

tered on December 30, 1954, for the defendant and against the plaintiff.

8. Notice of Appeal.

9. Reporter's Transcript of Proceedings.

10. Plaintiff's exhibits 1 to 10, inclusive, and Defendant's Exhibit A, in evidence.

11. Designation of Contents of Record on Appeal.

12. Bond on Appeal.

I further certify that the Clerk's fee for preparing and certifying this said record on appeal amounts to the sum of \$1.60 and that said sum has been paid to me by counsel for the appellant.

Witness my hand and the seal of said Court at Phoenix, Arizona, this 4th day of March, 1955.

[Seal] /s/ WM. H. LOVELESS,
Clerk.

[Endorsed]: No. 14682. United States Court of Appeals for the Ninth Circuit. Mattie Edens Medigovich, Appellant, vs. Pacific Mutual Life Insurance Company, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Arizona.

Filed March 7, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 14682

MATTIE EDENS MEDIGOVICH,
Appellant,
vs.

PACIFIC MUTUAL LIFE INSURANCE COM-
PANY, a Corporation,
Appellee.

CONCISE STATEMENT OF POINTS TO BE
RELIED ON BY APPELLANT ON AP-
PEAL

Appellant herein, Mattie Edens Medigovich, in-
tends to rely upon the following points for reversal
of the judgment of the District Court:

1. The District Court erred in not finding that an acceptance of premiums by the appellee insurer with knowledge of the insured's employment character constituted an estoppel to assert that the status existing at the time of death was not that of employee under the terms of the group policy No. GL-2208 and Certificate No. 266 issued thereunder.
2. The District Court erred in not resolving against the appellee insurer and in favor of the insured the manifest ambiguities created by language of the group policy which purported to apply the relationship, activities and duties of an employer-employee status to that of a partnership-partner status.
3. The District Court erred in not requiring, if it did require, the appellee insurer to sustain its bur-

den of proving that there was a cessation of employment by the insured within the meaning of the group policy.

4. The District Court erred in finding, if it did so find, that there was a complete severance of the relationship of partnership and active partner as between the Cottonwood Lumber Company co-partnership and Joan Medigovich, the insured, on or about September 17, 1952, under the terms of the group policy.

5. The District Court erred in not finding that the insured was at all times, from the effective date of the policy, July 3, 1952, up until the insured's death on January 23, 1952, a full-time employee (partner) temporarily working on a part-time basis within the terms and provisions of the group policy.

6. The District Court erred in finding, if it did so find, that the insured partner could be "laid off" or be granted a "leave of absence" under the provisions of the group policy relating to termination of insurance.

7. The District Court erred in not finding that the insured was at all times, from the effective date of the policy, July 3, 1952, until the insured's death on January 23, 1953, an "active partner" within the terms and provisions of the group policy.

Respectfully submitted,

SNELL & WILMER,

By /s/ MARK WILMER,

Attorneys for Appellant.

[Endorsed]: Filed March 5, 1955.



No. 14682

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MATTIE EDENS MEDIGOVICH,

Appellant,

vs.

PACIFIC MUTUAL LIFE
INSURANCE COMPANY,

Appellee.

*Appeal from the United
States District Court for
the District of Arizona*

APPELLANT'S OPENING BRIEF

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FILED

MAY 25 1955

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JURISDICTION

The above entitled proceeding arises upon an appeal from a judgment entered in an action by Mattie E. Medigovich, the appellant beneficiary, against the Pacific Mutual Insurance Company, a corporation, to recover the sum of \$5,000 under a contract of employee group insurance issued by the appellee, Pacific Mutual Insurance Company.

The amount in controversy exceeds \$3,000 exclusive of interest and costs. The jurisdiction of the District Court rests upon diversity of citizenship. 28 U.S.C. Sec. 1332(a)(b).

The action was tried by the District Court sitting without a jury on the complaint (R 6) and answer thereto (R 8).

The District Court ordered entry of a judgment in favor of the Pacific Mutual Insurance Company and against Mattie E. Medigovich (R 11) and the judgment from which appeal has been taken was entered on December 30, 1954 (R 12).

The judgment being final, the present appeal is predicated upon 28 U.S.C. Sec. 1291.

STATEMENT OF THE CASE

On the 3rd day of July, 1952, the appellee, the Pacific Mutual Insurance Company, issued a certificate of insurance under a master group life insurance policy upon the life of Joan E. Medigovich (R 25). Under said contract of insurance, the insurance company agreed to pay to the beneficiary, the appellant, Mattie E. Medigovich, the sum of \$5,000 if said Joan E. Medigovich died during the effective date and term thereof (Plaintiff's exhibit 3 in evidence). On January 23, 1953, seventeen year-old Joan took her life, apparently as a result of some temporary and tragic indisposition.

The contract of insurance was not between the insurance company and the employer of Joan E. Medigovich, but between the insurance company and a trustee for the Arizona Retail Lumber and Building Association trust fund (Plaintiff's Exhibit 1 in evidence, see R 32). The master policy was executed on the 3rd day of October, 1950, and was issued to the trustee for said association (Plaintiff's Exhibit 1 in evidence, see R 25, 26). The policy undertook to insure certain classes of employees of subscribing employers who were members of the association (Plaintiff's Exhibit 1 in evidence). The Cottonwood Lumber Company, a partnership, was a member of said association (R 24) and had been a qualified subscribing employer from the initiation of said group plan (R 34). Joan was a partner of said Cottonwood Lumber Co. (R 48, 57, 58).

While designed and worded for the true employer-employee

status, the policy additionally extended coverage to partners and sole proprietors by the following language:

"If any of the subscribing employers is a partnership, the partners thereof shall be considered employees within the meaning of this policy if and while actively engaged in the business of the partnership. If any of the subscribing employers is a proprietorship, the individual proprietor thereof shall be considered an employee on the same terms as those applicable to partners of a partnership." (Page 3, clause 4 of Master Policy, Plaintiff's Exhibit 1 in evidence).

The certificate of insurance issued on Joan E. Medigovich's life did not contain the above provision, nor did it contain any provision or provisions relating to or describing the activity of a partner to qualify as an employee under the terms of the policy (See Plaintiff's Exhibit 3 in evidence).

Some several months prior to the issuance of said certificate on Joan's life on July 3, 1952, Joan and her brother Billy Medigovich, aged thirteen, had filed applications as partners of the subscribing employer, the Cottonwood Lumber Company, and the trustee of the association accepted said applications, determined the premium contributions and issued the certificates (R 25, 37, 38). At this time the Cottonwood Lumber Company was a co-partnership composed of Mattie E. Medigovich, the appellant, Mike Medigovich, her husband, and their two children, Joan and Billy (R 48, 57, 58).

From its inception, the Cottonwood Lumber Company had been a family enterprise. The business had its birth and early growth with the appellant's father, W. F. Edens, under whose tutelage the appellant, Mattie E. Medigovich had grown up in the business (R 56). Then followed a family partnership consisting of the father, Mattie and her husband, Mike (R 57). In 1951 when the father retired from part ownership, a partnership of Mattie, Mike and Mattie's brother, J. F. Edens, was formed (R 57). Finally, in March of 1952, upon the withdrawal of J. F. Edens from the partnership, another family partnership was formed, composed as heretofore stated, of Mattie, Mike, Joan and Billy Medigovich

(R 57, 58); that in this connection, both Joan and her brother Billy contributed approximately \$10,000 each to the partnership, and it was contemplated under the partnership agreement that they would participate in the partnership activities within the limitations of their age and experience, when not engaged in schooling and other youth activities (R 48, 49, 85).

The nature and extent of Joan's activities in the partnership business included keeping of the partnership records, waiting on customers, taking charge of the company office when Mattie and Mike were away from the business, and appearances at retail lumber conventions as a partner; that on several occasions suggestions by Joan with respect to remodeling the store and use of new merchandising techniques were adopted by the partnership (R 59, 60, 61); that during her final high school term, Joan would work at the company office after getting home from school and on numerous occasions would also work in the evenings as well as Saturdays (R 60, 68, 71, 73, 77, 81); that during the summer months she would generally average a half of a day in the partnership business (R 76, 77, 80); that from about the 29th of September 1952 to the middle of November 1952, while Joan was attending Stanford University, the appellant was in constant communication with Joan by telephone and letters and advised and consulted with Joan with regard to partnership transactions and business (R 62, 63).

It was a matter of common knowledge in the community that Joan was a partner in the Cottonwood Lumber Company (R 88, 89, 90, 93, 98). Income tax returns were filed for Joan as a partner in the company (R 50) and a status report was filed with the Employment Security Commission identifying Joan as a partner (R 43, 44, 45). Additionally, the financial statements at the Cottonwood Bank identified Joan as a partner (R 96).

After returning from Stanford University, some time in the latter part of November, she was hospitalized for a week and then returned to the company business, where she resumed her former activities until her enrollment at Arizona State College (R 63, 64,

74, 75). It was contemplated, however, that while attending said college she would spend some time in the business on weekends (R 64). It was just shortly after her enrollment at the Arizona State College that Joan took her life.

Under a provision of the master policy entitled "TERMINATION OF AN EMPLOYEE'S INSURANCE" it is stated:

"(a) The insurance of an employee shall terminate thirty-one days after termination of employment. Cessation of active work in the classes of employees eligible for insurance shall be deemed termination of employment . . . " (See page 3a of master policy, Plaintiff's Exhibit 1 in evidence).

The District Court, while finding that Joan E. Medigovich was actively engaged in the business of the Cottonwood Lumber Company, from the issuance of the certificate July 3, 1952, up until her departure for Stanford University on or about September 17, 1952, found that there was a termination of her employment as an active partner in the Cottonwood Lumber Company partnership business as of the date of said departure and that accordingly her insurance terminated thirty-one days thereafter (R 11).

SPECIFICATION OF ERRORS RELIED UPON

1. The District Court erred in finding that there was a complete severance of the relationship of partnership and active partner as between the Cottonwood Lumber Company copartnership and Joan E. Medigovich, the insured, on or about September 17, 1952, under the terms of the group policy and Certificate No. 266 issued thereunder.

2. The District Court erred in not resolving against the appellee insurer and in favor of the insured the manifest ambiguities created by language of the group policy which purported to apply the relationship, activities and duties of an employer-employee status to that of a partnership-partner status.

3. The District Court erred in not finding that an acceptance of premiums by the appellee insurer with knowledge of the insured's employment character constituted an estoppel to assert

that the status existing at the time of death was not that of employee under the terms of the group policy No. GL2208 and Certificate No. 266 issued thereunder.

4. The District Court erred in not finding that the insured was at all times from on or about Sept. 17, 1952, up until the insured's death on January 23, 1953, a full-time employee, temporarily working on a part-time basis within the terms and provisions of the group policy and certificate issued thereunder.

SUMMARY OF ARGUMENT

1. The conclusion of the District Court that there was a severance of the relationship of partnership and active partner as between the Cottonwood Lumber Company copartnership and Joan E. Medigovich, partner, on or about September 17, 1952, under the contract of insurance was premised on a basic error of law. The basic error of law underlying the decision below is that when Joan E. Medigovich left the partnership business for the purpose of schooling at Stanford University and the circumstances were such that she was constantly consulted with respect to partnership transactions (R 63) and continued to draw partnership dividends (R 63) and continued her status as a general partner, with its attendant rights, liabilities and duties, that she thereby necessarily became a dormant or silent partner as distinguished from an active partner in the partnership business.

2. The conclusion of the District Court that on Joan's departure for Stanford University she thereby ceased to be actively engaged in the partnership business and that her insurance terminated thirty-one days thereafter, ignores the manifest ambiguities created by the policy language.

The language of the master policy and of the certificate was prepared by the insurer and contained the standard provisions adapted to the employer-employee relationship. In applying the provisions relating to activity and to termination of employment to the status of a partner or proprietor, it is quite apparent that language designed for the employee status will create ambiguities

when applied to the others. The activity qualifying the one as active within his status, would not necessarily qualify or disqualify the other as being active within his status. The degree of formality surrounding a leave of absence for the one would be quite dissimilar to the other. The failure of the District Court to resolve these ambiguities against the insurer and in favor of the insured was a basic error of law under the evidence of record, and an unjustifiably technical construction of the policy provisions.

3. The insurance company was apprised of the ages of both Joan and her brother Billy (R 41, 42) and would certainly be aware that their employment character as partners in the Cottonwood Lumber Company would necessarily be limited by their years, their experience and their activities devoted to schooling and other functions. The insurance company nevertheless accepted premiums on behalf of Joan E. Medigovich up to the date of her death on January 23, 1953, and on behalf of her brother Billy Medigovich up to the date of this action (R 38). By its acceptance of premiums and with knowledge of Joan's employment or partnership character, the insurance company is estopped to assert that the status existing at the time of death was not that of employee under the terms of the group policy No. GL 2208 and Certificate No. 266 issued thereunder.

4. On page 3 of the master policy under "INSURANCE SCHEDULE" the policy provides as follows:

"The classes of employees eligible for insurance hereunder shall be such of the classes of employees of a subscribing employer determined by conditions pertaining to employment as are reported in writing to the insurance company by the trustee, provided, however, that part-time employees (but not including full-time employees temporarily working on a part-time basis) shall not be eligible for insurance hereunder." (Plaintiff's Exhibit 1 in evidence)

The conclusion of the District Court in finding that Joan E. Medigovich was an active partner up until September 17, 1952,

and that there was a termination thirty-one days thereafter within the terms of the insurance contract, must be premised on the court's determination that there was a change of employment character as of that date.

The District Court failed to consider that with the premium having been paid, Joan was in fact eligible as of September 17 and thereafter as a full-time employee, temporarily working on a part-time basis within the meaning of the above provision.

ARGUMENT

The record clearly establishes that at all times from the issuance of the certificate on Joan E. Medigovich until her death, Joan was an active partner in the partnership business of her subscribing employer, the Cottonwood Lumber Co.

The insurance company chose to extend coverage under its group policy to partners and proprietors. Only in the master policy, page 3 thereof, *but not in the certificate*, does the insurer employ language wherein it attempts to describe the requisite attributes of eligibility for these two classifications:

"If any of the subscribing employers is a partnership the partners thereof shall be considered employees within the meaning of this policy if and while actively engaged in the business of the partnership. If any of the subscribing employers is a proprietorship the individual proprietor thereof shall be considered an employee on the same terms as those applicable to partners of a partnership." (Plaintiff's Exhibit 1 in evidence)

At the bottom of page 3 headed "INSURANCE TABLE" and subheaded "CLASSIFICATIONS", the policy permits *active partners*, proprietors and officers of member firms to be insured in the amount of \$5,000 without regard to weekly earnings as is the case with all other eligible employees.

Can it be said from a reading of the above provisions that the insurer has unambiguously spelled out the conduct or activity necessary on the part of either of these two classes?

Certainly the mere fact that the insurer in its preparation of

the policy terms and provisions designates partners and proprietors as employees does not in fact or in law change the status of these two classes so as to make them true employees. There can be little quarrel with the proposition that a proprietor or partner could devote far less time to his business and still be actively engaged in his business.

There is no measuring stick of activity for partners or proprietors. We do not know, from a fair reading of the policy, just how little or how much the partner or proprietor must be about his business. The policy does not require that the employee-partner be a managing partner, but seemingly permits coverage to extend to a general partner, who is an active partner as distinguished from a silent or dormant partner.

When Joan departed for Stanford, she certainly did not sever her relationship with the subscribing employer, the Cottonwood Lumber Company. She remained a general partner, with its attendant rights and liabilities. She continued to be a part owner of the business, drawing partnership dividends, and was regularly consulted by the appellant with regard to partnership business and transactions (R 63).

From September 27th until her death on January 23rd, Joan was certainly not as actively engaged in the partnership business as she was before her departure, but did she entirely cease her activity as a partner in the partnership business so as to become a dormant partner? Let us examine the record for evidence of the conduct of the employer, the Cottonwood Lumber Company, and the employee (partner) Joan E. Medigovich in this regard. The appellant testified:

"Q. When did Joan leave for Stanford?

"A. About the 27th of September.

"Q. When did she return?

"A. November 14th or 15th.

"Q. She was gone something over six weeks?

- "A. Maybe the 16th. Something over or about six weeks.
- "Q. During that period of time did you have occasion to correspond with her?
- "A. Every day.
- "Q. Did she answer your letters with respect to business matters particularly?
- "A. Yes, sir.
- "Q. Did you have occasion during that period of time or did the partnership to acquire some additional partnership property?
- "A. Yes, sir.
- "Q. What was that?
- "A. Sedona Lumber Company.
- "Q. Was that question of buying that additional business discussed with Joan by letters?
- "A. Yes, it certainly was; on the telephone and letters.
- "Q. You called her up and talked to her about it?
- "A. Yes, sir.
- "Q. Did you consistently during the entire time she was there keep her informed as to the partnership business affairs?
- "A. Yes, Sir.
- "Q. During that period of time did she continue to draw or was she entitled to go ahead drawing a portion of the partnership profit?
- "A. Yes, sir.
- "Q. I believe she did then return in the middle of November?
- "A. Yes.
- "Q. And stayed in Cottonwood about until January?
- "A. About the 19th of January. Or about the 20th of January, excuse me.

"Q. Pardon me?

"A. After the 20th of January.

"Q. What did she do in the business during that period of time?

"A. She wrote receipts. Went back to her old job, helped with the statements. We had lots to do around Christmas. Had to get all our customer gifts and customer cards, and she made bank deposits.

"Q. I take it during that period of time she was practically full time in the business?

"A. Yes, sir.

"Q. Then when she went to Tempe, Mrs. Medigovich, I believe you felt that because of the closeness of Tempe to Cottonwood, she would practically spend most every week end at home?

"A. We intended for her to spend every week end at home.

"Q. In that period of time did she resume her old job in the business?

"A. Yes, sir.

"Q. Over the week ends?

"A. Yes, sir." (R 62-64)

A "dormant partner" as defined by the cases set forth in 13 *Words and Phrases*, page 330-332, is one whose connection with the partnership business is concealed and one who does not take any active part in it. The above language was used by the Wyoming Supreme Court, citing 20 *R.C.L.* 834, in the oft cited case of *Dinkelspeel vs. Lewis*, 62 P. 2d 294, 298, 50 Wyo. 380, (1936); see also the definition that a "dormant partner" is one who takes no part in the business, and whose connection with it is unknown. Both secrecy and inactivity are implied thereby. Citing *National Bank of Salem vs. Thomas*, 47 N.Y. 15, 19; citing *Pars. Partn.* 33; *Winship vs. Bank of United States*, 30 U.S. (5 Pet.) 573, 8 Law Ed. 216.

It can hardly be claimed that Joan was a silent or dormant

partner when the record establishes Joan was well known in the community as a partner in the Cottonwood Lumber Company (R 88, 89, 90, 93, 98) and that both before and after her schooling period at Stanford, she worked around the business offices of the partnership (R 59-61, 63, 64, 68, 71, 73-77, 80, 81).

Nor can it be said that there was a "termination of employment" within the meaning of the section on page 3a of the policy. The generally conceded interpretation of the phrase "termination of employment" is that there is a complete severance of the employer-employee relationship. [See *Peters vs. Aetna Life Ins. Co.*, 273 NW 307, 279 Mich. 663, (1937)] There should be no question that Joan's departure for school at Stanford in contemplation of attending the fall semester there did not in and of itself constitute a severance of a relationship as a partner in the Cottonwood Lumber Company. The appellant submits that such an absence from the business for schooling purposes was within the contemplation of the subscribing employer, the Cottonwood Lumber Company, and of the appellee insurance company respecting the degree of Joan's activity and did not alter her status as an active partner in contra-distinction to a dormant partner. Evidence that Joan, upon returning from Stanford to Cottonwood, once again resumed her activities in the business substantiates the intent of both employer and employee in this regard. [Whether there was a permanent severance of the employer-employee relationship and not merely a suspension or temporary lay-off so as to end liability of insured under the group policy rested largely upon the intention of the employer. See *John Hancock Mutual Life Ins. Co. vs. Shoun*, 191 S.W. 2d 186, Tenn. (1945)]

Certainly, it is reasonable to assume that if the appellant, as one of the managing partners of the Cottonwood Lumber Company, considered Joan as no longer active in the partnership business, she would have cancelled Joan's certificate of insurance just as she did her father's when he retired from part ownership and activity in the lumber company (R 57, 59).

2. *Under at least one reasonable construction of the provision as set forth below, John E. Medigovich's absence from the business while at Stanford, was an authorized leave of absence which did not extend beyond the three months' limitation. The District Court's failure to give the construction most favorable to the insured was clearly erroneous.*

"TERMINATION OF AN EMPLOYEE'S INSURANCE

"An employee's insurance under this policy shall terminate at the earliest time indicated below; without prejudice, however, to any rights to insurance under the section entitled 'EXTENDED INSURANCE'; (a) the insurance of an employee shall terminate thirty-one days after termination of employment. Cessation of active work in the classes of employees eligible for insurance shall be deemed termination of employment, except that while an employee is absent on account of sickness or injury, employment shall be deemed to continue until premium payments for such employee's insurance are discontinued. *At the option of the Trustees the insurance of an employee may be continued during a temporary layoff but not beyond the end of the policy month following the policy month in which the layoff starts, or may be continued during an authorized leave of absence granted by a subscribing employer for reasons other than sickness or injury, but not beyond the period ending three months after such leave of absence starts.*"

There is no question that the Cottonwood Lumber Company partnership consented to Joan's absence from the partnership business for purposes of schooling at Stanford University. Does the above language necessarily require a specific exercise of option by the Trustee, and when under circumstances where the Trustee indicates a general policy to permit the subscribing employer to give such leaves of absence as the employer in his discretion may desire and as is limited by the three months' period (R 31, 32)? Certainly the language itself does not expressly require any affirmative action by either the subscribing employer to the Trustee of the association or by the Trustees to the insurer.

Moreover, the language may be reasonably construed as simply providing that the insurance of an employee may be continued

during an authorized leave of absence granted by a subscribing employer for reasons other than sickness or injury, but not beyond the period ending three months after such leave of absence starts. Under this construction of course there would be no termination of Joan's insurance as she returned before the period ending three months after such leave of absence started.

The appellant respectfully submits that this latter construction is not only a reasonable one under the circumstances, but is one favored by common sense when we consider that it is a partnership giving a partner a leave of absence rather than an employer giving a true employee a leave of absence.

3. The record clearly establishes that the appellee insurer with knowledge of Joan's employment character accepted premiums on her behalf up until her death. The failure of the District Court to find that this constituted an estoppel to assert that the status existing at the time of death was not that of employee under the terms of the group policy and certificate was clearly erroneous.

The record establishes by the testimony of the Trustee, Gus Michaels, that the insurance company, through its agent was apprised of the respective ages of Joan and Billy Medigovich (R 41, 42). The insurance company would be held to have had knowledge of their youth even without imputing the knowledge of its agents to the company, as the amount of premium payments returned to the company would in themselves indicate their youth (See page 6 "Calculations of Premiums" of the master policy, Plaintiff's Exhibit 1 in evidence).

Knowing the ages of Joan and Billy, it is then reasonable to assume that the company would realize that their activities as partners would certainly not be of a managerial character and would of necessity be limited by reason of their youth, experience and time devoted to education.

The record establishes that the insurance company accepted premiums on behalf of Joan up until the time of her death and

accepted premiums on behalf of Billy until the trial of this action notwithstanding the aforesaid knowledge (R 38).

The court's attention is directed to its decision in the case of *John Hancock Mutual Life Ins. Co. of Boston Mass. vs. Dorman*, 108 F.2d 220 . The court will recall that in this case the insured was a member of the board of directors of a bakery corporation and received no pay for his service as director; that under the California Labor Code a member of a board of directors is considered as an *employee* only if rendering actual services for the corporation *for pay*. The insurer denied coverage under its group policy on the ground that the director was not really an employee of the bakery corporation in that he received no compensation for his services. The insurer, through its agent, had knowledge of the employment character of the insured from the outset.

This court held that an acceptance of the premiums by the insurer with knowledge of the insured's employment character constituted an estoppel to assert the status existing at the time of death was not that of employee and that this estoppel applied as well to the contention that the insured was not an employee at the time of the issuance of the policy.

4. *A reasonable construction of the provision set forth below clearly supports the conclusion that the insured was at all times from September 17, 1952, up until the insured's death, eligible as a full-time employee temporarily working on a part time basis within the terms and provisions of the group policy and certificate issued thereunder.*

"INSURANCE SCHEDULE

"The classes of employees eligible for insurance hereunder shall be such of the classes of employees of a subscribing employer determined by conditions pertaining to employment as are reported in writing to the insurance company by the Trustee; *provided, however, that part-time employees (but not including full-time employees temporarily working on a part-time basis) shall not be eligible for insurance hereunder.*"

Here again we are faced with language of a typical group policy

which by its nature is designed for the true employer-employee relationship. Including within the policy as insureds partners of a partnership and sole proprietors and designating them as employees, as has been heretofore stated, creates obvious ambiguities when these provisions are applied to these two classifications. By the very nature of the status, is it possible to have in legal contemplation a part-time partner or a part-time proprietor? Applying, however, the language in analogous fashion and resolving any ambiguity in favor of the insured in accordance with settled rules of construction [*Spaun Horst vs. Equitable Life Assur. Soc. of U.S.*, 88 Fed. 2d 849. See also *A. J. Bayless Markets vs. Ohio Casualty Ins. Co.*, 104 P.2d 145, 55 Ariz. 520 (1945)], would it not be a reasonable interpretation to say that Joan was in every sense a full-time employee (partner) who was temporarily absenting herself from the partnership business for schooling reasons?

In the case of *Equitable Life Assur. Soc. of United States vs. Wortham*, 67 F.2d 721, a decision of the Circuit Court of Appeals, Seventh Circuit (1933) the Circuit Court used the following language on page 723 thereof:

"In the case of such an employee, what might reasonably be considered as full time service depends upon the relations and transactions between employer and employee. It is not essential to full time employment that such an employee be regularly and continuously at a particular place such as the employer's office.

Whatever of ambiguity or indefiniteness there may be in the words 'working full time' as applied to such a case can avail the appellant (insurance company) nothing since it chose to employ these words in the preparation of the insurance contract."

If she had applied for insurance on September 17, 1952, could her eligibility for insurance coverage have been denied under the terms of this provision?

The argument may then be urged that eligibility as such only applies as of the date that Joan first applied for insurance some months before July 3, 1952; that it is not of a continuous charac-

ter in its proper connotation. In 14 *Words and Phrases*, page 354, it is said that "etymologically the meaning of 'eligible' is capable of being chosen, and therefore denotes a condition existing at the time of choosing whether by election or by appointment. This is the accurate meaning of the term and the primary definition given by all lexicographers, but in some dictionaries a second definition is given of the word as *legally qualified*. It must also be conceded that often not only colloquially but also in judicial opinions the word is used in the latter sense."

The appellant submits that the insurance company did in fact use the term "eligible" in the sense of being *legally qualified*. On page 3, clause 2, the following language in the policy is used:

"Upon written request from the Trustees to the insurance company that any classes of employees of a subscribing employer be eliminated from the classes of employees eligible for insurance hereunder . . . "

The insurer is speaking of employees already insured or who have been initially certificated as eligible; that upon written request of the Trustee these employees, who have continued to be eligible, shall be eliminated.

Clearly then, Joan E. Medigovich, as of September 17, 1952, was eligible as a full-time employee temporarily working on a part-time basis within the terms and provisions of the master policy and certificate issued thereunder.

CONCLUSION

With a desire to attain some degree of clarity in the presentation of this matter, the writer has individually or separately attempted to analyze the points raised. It is believed, however, that only by stepping out of the trees and examining the forest from without can the appellant's position be best appreciated.

Let us then examine the following factors as a group without attempting to single out or attach significance to any individual item:

1. A group policy, the language of which was prepared and selected by the insurance company.

2. A certificate of insurance, the language of which was prepared and selected by the insurance company, and which did not contain any provision or provisions apprising the holder of said certificate as to the qualifications respecting his character of employment.

3. The master policy was not issued to the subscribing employer, but to a trustee for an association of employers (R. 33).

4. The insurance company issued certificates of insurance on a seventeen year old girl, Joan E. Medigovich, and a thirteen year old boy, Billy Medigovich, as active partners in the Cottonwood Lumber Company partnership.

5. The insurance company, having knowledge of the ages of Joan and Billy, would be held to know the natural limitations of experience and time devoted to schooling incident thereto.

6. The insurance company accepted premiums on behalf of Joan up until her death and on Billy up to the trial of this action.

7. Joan was a partner with a \$10,000 investment, who was commonly recognized in the community as a partner, and who was active in the partnership business within the limits of her abilities and experience, and save for time devoted to schooling.

8. With respect to Joan's departure for Stanford, the appellant testified that she so advised the trustee, Gus Michaels; Mr. Michaels, however, did not remember of having been so advised (R 29).

9. With regard to the provision relating to leave of absence, the trustee, Gus Michaels, testified:

"Q. Mr. Michaels, may I ask this question then: With respect to partners and with respect to the matter of insurance remaining in force with respect to employees on a leave of absence, if the employer continued to pay the insurance premiums during an allowable

period of absence, did you have any reason or cause for not agreeing to that?

"MR. LESTER: I object to that on the same grounds.

"THE COURT: Same ruling.

"A. Actually that is more a determination of the employer. As long as the bills would go out every month as they do and the insurance is paid every month, I really have no way of knowing whether a man is on leave or not.

"Q. I take it as a matter of general policy so long as the employer is satisfied to pay the insurance premiums, you would be quite agreeable to going along that the insurance remained in force.

"A. Oh, yes." (R 31, 32)

9. The provisions relating to termination of insurance, cessation of employment and leave of absence were provisions manifestly designed for a typical group employee plan and not for partners and proprietors.

10. No inquiries or instructions were directed to the trustee by the insurance company with respect to the degree of activity of Joan and Billy as employee partners of the subscribing employer, the Cottonwood Lumber Company (R. 37-39).

When we lump together the over-all effect of all these circumstances as they related to the seventeen year old insured, Joan E. Medigovich, it seems manifest that we have a situation fraught with possibilities for misunderstanding and misinterpretation.

Certainly we have here a unique situation, to which the usually applicable decisions can only be cited by way of analogy. We first of all have standard employer-employee language applied to a partnership-partner status, with its legally distinct characteristics and consequences. We secondly have a contract of group insurance, not between the insurance company and the employer, but between the insurance company and a trustee for an association of employers. The trustee, under its arrangement with the

insurance company in this instance, acted as a sort of bookkeeper and collection agent for the insurance company (R 26-29, 33-36), though considered as an agent for the subscribing employer (Plaintiff's Exhibit 1 in evidence).

Thus, not only is the insured faced with questions of policy interpretation that would tax a lawyer's understanding, but the insured's agent, the trustee, must also correctly interpret the policy requirements as the insured would be bound by any erroneous interpretation. Obviously, Gus Michaels did not interpret the leave of absence provision to require an affirmative exercise of option or he would not have testified as he did. The insurance company would urge, however, that it is not what Gus Michaels understood but what he should have understood, notwithstanding a provision in the policy whereby the insurance company permitted the trustee to say who was eligible and who was not eligible thereunder. (Clause 1 and 2 on page 3 of the master policy, Plaintiff's Exhibit 1 in evidence)

To permit the appellee to take refuge behind a narrow, refined construction of this master policy when the language and surrounding circumstances were singularly filled with technical pitfalls for the 17 year old insured is to exchange justice and understanding for the precise word or act.

Judgment for the insurance company should be reversed and the cause should be remanded for appropriate action.

Respectfully submitted,

SNELL & WILMER

By JAMES H. O'CONNOR

Attorney for Appellant

No. 14,682

In the
United States Court of Appeals
For the Ninth Circuit

MATTIE EDENS MEDIGOVICH,

Appellant,

v.

PACIFIC MUTUAL LIFE

INSURANCE COMPANY, a Corporation,

Appellee.

Appellee's Brief

Appeal from the United States District Court for the District of Arizona

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In the

United States Court of Appeals

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MATTIE EDENS MEDIGOVICH,

Appellant,

v.

PACIFIC MUTUAL LIFE

INSURANCE COMPANY, a Corporation,

Appellee.

Appellee's Brief

Appeal from the United States District Court for the District of Arizona

STATEMENT OF THE CASE

The pertinent facts are these:

Pacific Mutual Life Insurance Company, in October of 1950, issued a group policy to one Gus R. Michaels, as Trustee for the Arizona Retail Lumber and Builders Supply Association, Inc., Trust Fund, for the purpose of offering group insurance to employees of subscribing members of the Association.

The Cottonwood Lumber Company, a family partnership, was a member of said retail lumber association, and as such, became a subscriber to the group policy in question at its inception.

On July 3, 1952, after having graduated from high school in May, Joan Medigovich applied for and was issued a certificate of insurance under the group policy, as a partner of the aforementioned Cottonwood Lumber Company.

During the three months immediately preceding the issuance of the certificate, Joan worked at the Cottonwood Lumber Company on the average of only two hours a day (R. 80, 82), mostly after school and on weekends (R. 73).

During the summer of 1952 (from July to September), Joan worked at the business on the average of approximately half a day (R. 82).

Then on September 27, 1952, Joan left Cottonwood, Arizona to attend Stanford University in Palo Alto, California (R. 62, 74). Her attendance at Stanford was interrupted by some nervous indisposition and she returned to Cottonwood, Arizona, on November 14 or 15, at which time she was hospitalized for about a week (R. 62, 74). Consequently, she was away from the place of business for a period of nearly two months.

It is claimed that while Joan was attending college at Stanford, her parents discussed problems of the business with her by telephone and by mail (R. 67). These communications were the extent of Joan's participation and activity in the business from September 27 until late November. With respect to these communications, Appellant, Joan's mother, testified that she would have so communicated with her daughter anyway, whether she had had any interest in the business or not (R. 67).

After leaving the hospital late in November, Joan returned to work at the Cottonwood Lumber Company for the first time since her departure to Stanford in September. In January, 1953, she moved to Phoenix, Arizona, to enroll

at Arizona State College, where she planned to continue her college education. A few days later she committed suicide.

This suit was eventually brought to recover upon the group policy in question, in the amount of Five Thousand Dollars (\$5,000.00). The insurance company, Appellee herein defended the action upon the ground that the policy never took effect because Joan Medigovich was not eligible for insurance in the first place, and upon the ground that even if the policy did take effect, the insurance upon her life terminated in accordance with the policy terms because of her absence from the business while at Stanford University.

After hearing the evidence and considering the Briefs of counsel, the District Court found and concluded as follows:

“The Court finds that Joan E. Medigovich, deceased, was insured by the defendant in the amount of \$5,000 effective July 3, 1952, as a partner actively engaged in the business of Cottonwood Lumber Company, a partnership. The Court finds, further, however, that Joan E. Medigovich ceased to be actively engaged in the business of Cottonwood Lumber Company on or about September 17, 1952, and that her insurance terminated thirty-one (31) days thereafter, as provided by the terms of Group Policy No. DL-2208 and Certificate No. 266 issued thereunder. Accordingly, it is ordered that the Clerk enter judgment herein in favor of the defendant and against the plaintiff.”

From this judgment, the plaintiff has appealed.

SUMMARY OF ARGUMENT

The issues are twofold: the first is whether the deceased, Joan Medigovich, was eligible for insurance under the group policy. The second is whether said insurance, assum-

ing it ever became effective, was thereafter terminated by the terms of the policy.

1. The policy provides that partners of a business, if active, shall be considered employees. Assuming that deceased was an active partner, she was therefore considered an employee. The policy provides, however, that part-time employees shall not be eligible for insurance. The record shows that deceased worked at the business on a part-time basis only. The policy further provides that persons eligible for insurance must first have completed three months of full-time employment. The record, in this respect, shows that deceased worked on the average of only two hours a day during the three months prior to issuance of her certificate of insurance, as she was still attending high school during most of those three months. Consequently, although deceased may have been an active partner and therefore, an employee, she nevertheless failed to meet the requirements pertaining to employees, which we repeat are as follows:

1. Part-time employees are not eligible for insurance;
and
2. Those eligible for insurance shall first complete three months of full-time employment.

The policy does not insure active partners per se, but only places them in the category of employees for insurance purposes, subject to all requirements stated in the policy respecting all classes of employees.

2. The policy provides that the insurance of an employee shall terminate 31 days after termination of employment, and that cessation of active work shall be deemed termination of employment. Legal decisions hold that cessation of active work occurs when a person is no longer performing substantially all of his usual duties. The record shows that

deceased was not performing and could not have performed substantially all of her usual duties during the period she was at Stanford University, which was more than 31 days.

The policy also provides that the insurance may be continued during an authorized leave of absence, at the option of the Trustee. The record, however, fails to disclose that any such option was exercised.

ARGUMENT

I. Deceased Not Eligible for Insurance

Realizing that the District Court based its judgment upon a finding that deceased's insurance, though effective in the first instance, afterwards became terminated, and consequently, that it may be unnecessary to pursue this issue further, we nevertheless feel compelled to do so for the reason that Appellant has seen fit to do so and because a judgment, sustainable on either one of two grounds, is nevertheless sustainable.

Bearing in mind that deceased was principally engaged as a high school student during the three months prior to issuance of her certificate and that during this period she averaged but two hours a day working at the business, and that even after school was over, she still only worked on a part-time basis—the question is, whether the extent of her activity in the business made her eligible for insurance under the policy.

The pertinent provisions of the policy are as follows :

The classes of employees eligible for insurance hereunder shall be such of the classes of employees of a Subscribing Employer, determined by conditions pertaining to employment, as are reported in writing to the Insurance Company by the Trustees; *provided, however, that part-time employees* (but not including

full-time employees temporarily working on a part-time basis) shall not be eligible for insurance hereunder.

If any of the Subscribing Employers is a partnership, the partners thereof shall be considered employees within the meaning of this policy if and while actively engaged in the business of the partnership.

Each present and future employee in a class of employees eligible for insurance under this policy shall become insured hereunder as follows:

- (a) (Inapplicable)
- (b) *immediately upon completion of three calendar months of full-time employment with a Subscribing Employer.*

In the above provisions, it is readily seen that active partners such as deceased was, do not become insurable merely because they are active partners, as Appellant contends. Being an active partner merely entitles one to be considered an employee.

It is conceded that deceased, by reason of being an active partner, was to be considered an employee. However, as an employee, and like all other classes of employees, deceased was subject to the remaining requirements before she could be eligible for insurance: she must not have been a part-time employee, which the record shows she was; and she must have completed three calendar months of full-time employment before becoming insured, which the record shows she did not do.

As Appellant points out, the policy was obviously written for employee group insurance, but made available to partners, proprietors and officers. However, we do not believe that by making said insurance available to partners, it was intended that they be excluded or exempted from the various terms, provisions and requirements of the policy.

What Appellant urges, actually, is that partners, as long as they are not silent partners, automatically become insured once and forever, and become completely immune from the terms of the policy, so long as premiums are paid. We do not believe that the language of the policy lends itself to this interpretation. From the practical view, it should be borne in mind that employee group insurance is predicated upon the risk experience of the group, and that it is contrary to sound insurance practice to insure persons who may present a different risk. We think it was contemplated that partners who devote full time to the business would present the same type of risk as full-time employees. By the same token, we hardly think that partners who do not devote full time to the business are apt to represent the risk typical of the group. The tragedy and suicide of the deceased is an ironic illustration.

In making group insurance available to partners as well as to the usual type of employee, the insurance company had the right to prescribe its own requirements and also the right to set forth and use its own definitions. It defines partners as employees, thereby subjecting them to all employee requirements. The mere fact that deceased was not, by ordinary definition, an employee, but rather a partner, does not mean that the courts may ignore policy definition and substitute different definitions and different requirements, as Appellant would have this Court do.

When a policy of insurance defines active partners as employees, for insurance purposes, and specifically places them in that category so as to subject them to the same requirements applicable to all types of employees, neither the insured nor the beneficiary can rightfully urge that these requirements do not apply merely because insured's relationship to the business was not that of an employee

as that term is ordinarily defined. There is nothing in the law which prohibits an insurer from creating and defining categories for insurance purposes, and specifying the requirements relating thereto. If the requirements are not met by a particular applicant, then he or she is not eligible.

The policy would have to be altered and tortured in order to give it Appellant's construction, which is that being an active partner in and of itself, renders one eligible for insurance, and that all other policy requirements have no application whatever. If such were true, the policy would have simply stated that "active partners are hereby insurable."

Appellant complains that the policy is not adaptable to the particular status enjoyed by deceased while a partner of the Cottonwood Lumber Company. We submit that this is no reason to distort or change the policy.

II. Deceased's Insurance Terminated 31 Days After Absenting Herself From the Business.

The evidence is undisputed that deceased left the business and went to Stanford University in September, 1952, and did not return until late November, a period of more than 31 days. It is clear that she was not actively engaged in the business during this period. It is claimed, however, that she was kept advised of major developments during her absence. This is not an unusual situation between parent and child, particularly when that child's inheritance has been invested for her in the family business. The mere fact that deceased corresponded with her mother and father about the business does not justify a finding that she remained actively at work in said business. If so, a partner or a proprietor could remain abroad for years, either on pleasure or on a totally different type of business, and

still remain insured simply by expressing interest in the affairs of the business by mail. Such was obviously not the intention of the insurer.

The undisputed fact remains that deceased was physically absent from the business from September to late November, 1952. The only question, therefore, is whether such absence, taking into consideration her continued interest by correspondence, constituted a cessation of active work so as to terminate her insurance in accordance with the provisions of the policy. The answer to this question is found in the termination clause itself and in the cases which define the term *active work*.

The termination clause in the policy provides as follows:

"An employee's insurance under this policy shall terminate at the earliest time indicated below; * * *:

- (a) *The insurance of an employee shall terminate thirty-one days after termination of employment. Cessation of active work in the classes of employees eligible for insurance shall be deemed termination of employment, except that while an employee is absent on account of sickness or injury, employment shall be deemed to continue until premium payments for such employee's insurance are discontinued. At the option of the Trustees, the insurance of an employee may be continued during a temporary lay-off but not beyond the end of the policy month following the policy month in which the lay-off starts, or may be continued during an authorized leave of absence granted by a Subscribing Employer for reasons other than sickness or injury but not beyond the period ending three months after such leave of absence starts.*"

This gives rise to the question of what constitutes *cessation of active work*. In *Colantonio v. Equitable Life Assur. Soc. of The United States*, 100 N.E. 2d 716, cessation of

active work was deemed to occur when the employee is no longer performing substantially all of his usual duties. The same test was used in *Leach v. Metropolitan Life Ins. Co.*, 263 Pac. 784, and *Garber v. Chrysler Corporation*, 50 N.E. 2d 416.

It is obvious from the record that deceased was not, during her absence, performing substantially all of her usual duties, or at least the trial court was justified in so concluding. She therefore had ceased active work during that period, and the Court properly found that her insurance terminated after the expiration of 31 days, in accordance with the policy.

There is nothing in the record to show that the option provision was ever exercised or complied with so as to continue the insurance. Whether the option was not exercised because of inadvertence or, more logically, because it was intended that deceased would not return from college for more than three months, is of no consequence; the fact remains that the option was never exercised so as to continue the insurance, and the trial judge, sitting as the trier of facts, was justified in finding that the facts necessary to constitute an option were not sufficiently shown.

We search the record and find nothing to show that the Trustees exercised the option to continue deceased's insurance. An option is not exercised by silence, inaction, or by mere desire and intention. It requires a positive act. In *Morales v. Equitable Life Assur. Soc. of The United States*, 60 N.E. 2d 747, the court had occasion to rule on what would constitute an exercise of an option of this type under a group insurance policy. The policy provided that the insurance would terminate upon termination of employment, but that at the option of the employer, the insurance of an employee on leave of absence may be continued. The court

held that the option provision was clear and unambiguous and held that it required affirmative action on the part of the employer communicated to the insurer.

The evidence disclosed that the Trustee did not know and was not notified with respect to deceased's insurance, that she was absent from the business (R. 36). Moreover, there is no evidence that either the Trustee or the employer took affirmative action in the matter, and no evidence that any such action was communicated to the insurance company. The Court, therefore, was justified in finding that the facts essential to this or any option were lacking, and consequently, that no option was exercised.

Appellant suggests that perhaps the continued paying of premiums after deceased absented herself from the business was an exercise of the option to continue the insurance. This conclusion is foreclosed by the fact that the termination clause specifically provides under what circumstances continued payment of premiums shall operate to continue the insurance, viz., when an employee is absent on account of sickness or injury. The maxim *expressio unius exclusio alterus* renders Appellant's contention untenable.

Defendant may well have had the burden of proving that the insurance terminated, and this was sustained by proof of cessation of active work by deceased during her absence during which time she was unable to perform substantially all of her usual duties in the business. However, since it is Appellant's contention that the insurance was continued, the burden of proof was upon her to prove that the option was exercised by establishing the requisite facts. In weighing the evidence, the trial court came to the conclusion that those facts were not sufficiently established. The evidence in the case is not such as to compel a different conclusion, and therefore the conclusion of the trial court should not be

disturbed. Appellant, in effect, asks this Court now to reweigh the evidence and to draw different inferences therefrom. We do not believe that such is the function of the Appellate Court when there is sufficient evidence to support the lower Court's findings of fact.

In her Memorandum filed with the trial court, plaintiff took the position that deceased was not given a "leave of absence" but was merely absent from the business for schooling purposes. Now, in her Appellant's Brief, she takes the position that it *was* a "leave of absence". Without trying to reconcile these positions, we merely state that the result is the same in either event.

Plaintiff argues that deceased did not sever completely her relationship of partner in the Cottonwood Lumber Company. This is not denied, but it makes no difference that she remained a partner during her absence from the business, for the insurance company has the right to prescribe, as it did in this policy, what conditions of employment and activity are required, and under what conditions said insurance shall terminate.

The policy clearly and unambiguously sets forth the conditions which will operate to terminate the insurance, and once those conditions are met, as they were here, nothing short of alteration of the policy will affect the result. Such is, in effect, what Appellant urges this Court to do, principally by contending that the termination clause is ambiguous. Said clause, we submit, is not ambiguous; no interpretation is necessary, except as to the meaning of "active work" and as to what constitutes exercise of an option. These matters are succinctly defined by the authorities previously cited.

III. Regarding Appellant's Estoppel Argument.

As we understand her Brief, Appellant contends that defendant had knowledge of deceased's age, which was 17 years, and therefore should have realized that she was probably too young to be an active partner so as to qualify for insurance, and that by issuing her a certificate of insurance, defendant became estopped from afterwards questioning her eligibility and also from terminating her insurance. If there is any logic to this reasoning, then it must be because 17 year olds are per se not insurable. In other words, the underlying premise of Appellant's syllogism is that 17 year olds are not eligible for insurance. This premise is obviously without merit, since there is no age limitation or age requirement in the policy, nor is there anything inherently impossible about a 17 year old being able to meet the employment requirements of the policy.

Appellant cites the case of *John Hancock Mutual Life Ins. Co. of Boston Mass. v. Dorman*, 108 F.2d 220, to support her argument. However, the facts in that case are clearly distinguishable from those at bar. In that case, the insurance company knew at the time it issued the policy that insured received no pay for his employment, which was a specific requirement of the policy. This knowledge, the Court held constituted an estoppel against the company. In the case at bar, there is no age requirement. Also, there is no evidence that Appellee had any knowledge that deceased was only a part-time worker, and, more importantly, no knowledge that deceased quit work and went to Stanford University.

Moreover, defendant was entitled to rely upon deceased's application for insurance showing her to be a partner, and was entitled to assume that she was actively engaged in the business on a full-time basis as required by the policy; the

defendant was under no obligation to investigate her true status or to speculate that she might not be fulfilling the requirements. In *Byrnes v. Mutual Life Insurance Company of New York*, (Ariz.) 217 F.2d 497, decided by this Court last year, it was held that an insurance company has the right to rely upon an insured's representation and that it has no duty to question the veracity of the applicant and no duty to pursue in search of the true facts. This rule is based upon identical holdings in the following Arizona cases:

Greber v. Equitable Life Assur. Soc. of United States, 43 Ariz. 1, 28 P.2d 817;

American Nat. Ins. Co. v. Caldwell, 70 Ariz. 78, 216 P.2d 413;

Modern Woodmen of America v. Stevens, 70 Ariz. 232, 219 P.2d 322.

We fail to see, therefore, how Appellee's knowledge of deceased's age estops Appellee from showing, (1) that deceased was ineligible for insurance in the first place on account of not being a full-time employee, and (2) that even if eligible, her insurance nevertheless terminated thereafter on account of her departure from the business whereby she ceased to perform substantially all of her usual duties for more than 31 days.

The mere fact that premiums were paid on deceased's insurance up to the time of her death is of no consequence. The essentials of an estoppel are knowledge by the insurer of a particular fact and the assertion of some right inconsistent with its present position, resulting in prejudice to the insured who has relied on the former's conduct.

Moore v. Meyers, (Ariz.) 253 Pac. 626;

Peterson v. Hudson Ins. Co. (Ariz.) 15 P.2d 249;

Insurance Co. of America v. Williams, (Ariz.) 26 P.2d 117.

In the present case, Appellee-insurer had knowledge of insured's age only. It had no other knowledge whatever concerning her employment or subsequent departure from the business. It is therefore needless to go further and belabor the fact that Appellee at no time asserted rights inconsistent with its present position.

The trial court necessarily found that the necessary elements of estoppel were lacking, and Appellant has not demonstrated that the evidence compels a different conclusion.

CONCLUSION

With respect to the question of whether deceased was eligible for insurance, Appellee respectfully submits that the trial court erroneously concluded that she was, for the reason that there is no evidence in the record that deceased was a full-time employee having completed three months of full-time employment so as to become eligible for insurance.

With respect to the remaining questions, Appellant has failed to show that the trial court's findings are unsupported by the evidence.

This Court, as well as other appellate tribunals, has often held that it must view the evidence most favorably to Appellees and draw all inferences fairly deducible from the facts in their favor. *United States v. Aspinwall*, 96 F.2d 867.

Appellee respectfully submits that the judgment of the District Court should be affirmed.

Respectfully submitted,

EVANS, HULL, KITCHEL
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By RALPH J. LESTER

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No. 14,685

United States Court of Appeals
For the Ninth Circuit

DONALD OXFORD,

Appellant,

vs.

CARSON CONSTRUCTION CO., D. K. MAC-
DONALD & COMPANY, and ALASKA
INDUSTRIAL BOARD,

Appellees.

Appeal from the District Court for the
District of Alaska, First Division.

BRIEF FOR APPELLEES
CARSON CONSTRUCTION CO. AND
D. K. MacDONALD & COMPANY.

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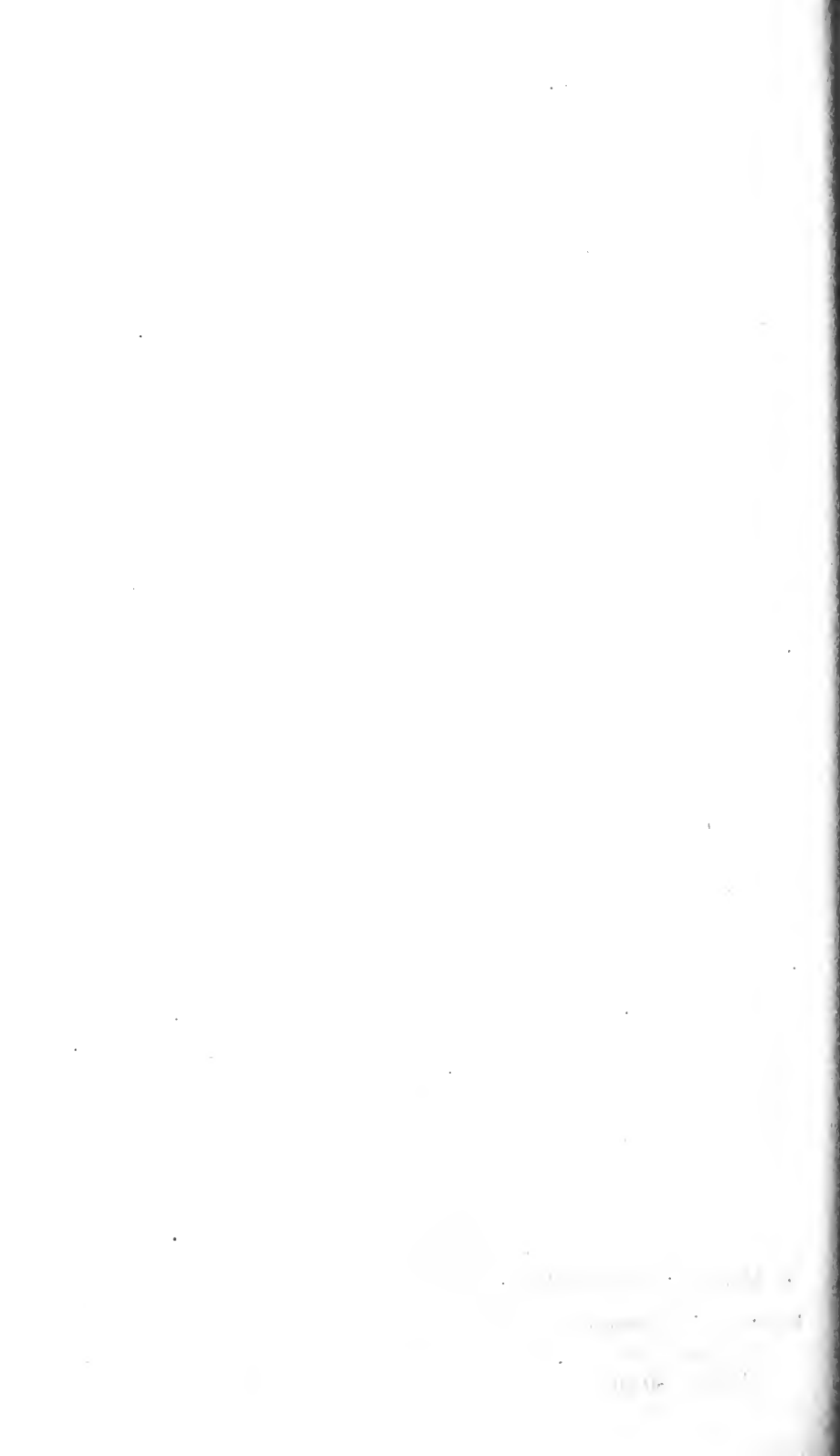
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United States Court of Appeals For the Ninth Circuit

DONALD OXFORD,

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CARSON CONSTRUCTION Co., D. K. MAC-
DONALD & COMPANY, and ALASKA
INDUSTRIAL BOARD,

Appellees.

Appeal from the District Court for the
District of Alaska, First Division.

BRIEF FOR APPELLEES CARSON CONSTRUCTION CO. AND D. K. MacDONALD & COMPANY.

FACTS.

Donald Oxford, a heavily built single man of Fort Smith, Arkansas, was employed by the Carson Construction Co. as a carpenter in Juneau, Alaska, on September 4, 1951. He alleges that on that date at about 3:00 p.m. he, with another employee, lifted a 4"x12"x20' light spruce screed, moving it about ten feet. After setting the screed down on some saw-horses, he said to his companion: "I had hurt my back." He did not consider himself as "hurt bad" and

he continued his regular employment until quitting time at 5:00 p.m. Next day he started work but complained of back pain and was sent to the doctor by his foreman.

In 1949, when employed by a different employer at Adak, Alaska, Oxford had injured his back while carrying a 16 ft. tank stave. A "puff of sudden dust" knocked the stave off his back, causing a jerk to his back and a subsequent back strain. His back was sore for four or five days after this incident.

Oxford's pattern of employment in the past was very irregular, and normally he worked approximately six months out of the year.

The employer, after the September 4, 1951 injury, paid Oxford temporary disability compensation at the rate of his high Alaska wages for the period from the date of his injury to November 15, 1951, in the amount of \$1,106.00.

Dr. Duncan, an orthopedist of Seattle who examined Oxford, reported on October 19, 1951 that his disability should not exceed a few weeks from that date.

Subsequently, the insurance company authorized, at its expense, an operation for the excision of a lipoma in Oxford's back, the company expressly denying any further liability for the alleged injury of September 4, 1951.

After the lipoma removal, Oxford continued to complain of back pains. The symptoms, according to Dr. Hoge, did not indicate a ruptured disc, and x-rays

indicated the possibility of an old injury antedating the September 1951 incident as the cause of the disability (Tr. 29).

At the employee's instigation, he was operated on by doctors of the Veterans' Administration on March 11, 1953. A laminectomy and fusion was performed. No evidence of an old or recent fracture or of any dislocation was discovered. It was found that Oxford was suffering from a congenital unstable back and the x-ray evidence also indicated the presence of a pathological degenerative disc.

Dr. Martini, who operated on Oxford, did not believe that Oxford's condition, as found at surgery, was produced by the incident of September 4, 1951. "The degenerative disc would take five to ten years to develop and the loose vertebral segment could not be related to any injury." (Tr. 50-51.)

Subsequently, Mr. Oxford filed an application for adjustment of claim with the Alaska Industrial Board. After a hearing before the full membership of the Board, a finding was made that "applicant did not suffer injury arising out of and in the course of his employment." The decision denying compensation was appealed to the United States District Court for the District of Alaska and the case was remanded to the Board for more detailed findings. A new decision was then rendered by the Board setting forth in more detail the facts of the case, and concluding: "(1) Applicant suffered no accidental injury arising out of and in the course of his employment with the defendant, Carson Construction Co.

(2) Applicant's subsequent operation and disability were not attributable to any accidental injury arising out of and in the course of his employment with the defendant company." This decision was again appealed to the United States District Court for the District of Alaska, which learned court affirmed the decision of the Alaska Industrial Board, holding that there was substantial evidence to support the findings of the Board. It is from this decision of the United States District Court that this appeal has been taken.

ARGUMENT.

I.

THE FINDINGS OF THE ALASKA INDUSTRIAL BOARD THAT OXFORD DID NOT SUSTAIN AN INJURY ARISING OUT OF AND IN THE COURSE OF HIS EMPLOYMENT SHOULD BE UPHOLD SINCE SUCH FINDING IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

Counsel for appellant ignores one most important aspect of this case in his brief. The Alaska Industrial Board found that Oxford did not suffer an injury arising out of and in the course of his employment under the provisions of the Alaska Workmen's Compensation Act, and further found that any disability suffered by Mr. Oxford was not attributable to an injury arising out of and in the course of his employment with the defendant company. In appellant's brief, these findings of the Board in effect are completely ignored. From counsel's brief one would assume that the Board had found that Oxford had sustained an accidental injury arising out of and in the course of his employment.

Section 43-3-22 ACLA 1949 provides in part: "An award by the full Board shall be conclusive and binding as to all questions of fact." The Board, in the subject case, has found that Oxford did not sustain an injury arising out of and in the course of his employment with Carson Construction Co. The law in regard to appeals from a Board's findings is set forth in Larson's Workmen's Compensation Law, Vol. 2, Sec. 80.10, as follows:

"A finding of fact based on no evidence is an error of law. Accordingly, in compensation law, as in all administrative law, an award may be reversed if not supported by any evidence. Conversely, since the compensation board has expressly been entrusted with the power to find the facts, its fact findings must be affirmed if supported by any evidence, even if the reviewing court thinks the evidence points the other way. This statement is, without any close competition, the number-one cliché of compensation law, and occurs in some form in the first paragraph of compensation opinions almost as a matter of course."

At Section 80.20 in his work, Larson goes on to state:

"The principal corollary of the 'substantial-evidence' rule is the proposition that the reviewing court will not itself weigh the evidence, nor substitute its judgment for that of the commission, even when it is convinced that the weight of the evidence is contrary to the commission's findings."

The burden of proof was on the applicant to show that he suffered an injury arising out of and in the

course of his employment, and the Alaska Industrial Board, after reviewing all the evidence in this case, found that that burden of proof was not met. The learned judge of the United States District Court for the District of Alaska, after carefully reviewing all of the evidence, found that there was substantial evidence upon which the Board based its findings. Unless this honorable court should find that there was no evidence to justify the Board's finding, it is respectfully submitted that the decision below should be affirmed. There was more than ample evidence upon which the Board based its decision.

Mr. Oxford, who had had a prior injury to his back, described the incident of September 4, 1951, in the following manner:

"A. . . . Well, when I got ahold of one end of this and he got hold of the other, this timber was dry Spruce and it was light and I lifted it up and we moved about 10 or 12 feet carrying it around, sort of sideways—over foot motion—and when I got the screed set down on some saw horses, I told McCurry that I had hurt my back.

Q. In other words, you say that this template was Spruce and was light.

A. Dry Spruce, yes sir.

Q. And it was light?

A. Yes sir.

Q. You told McCurry that you hurt your back after you had set it down.

A. After I set the screed down I said, 'I hurt my back lifting that.'

Q. What happened immediately after the accident? Did you go to the hospital, or what?

A. No. I went back up there—I didn't think I was bad hurt or anything—I went back up on top of the deck, set the screed, and pretty soon McCurry come back up there and it was about 3:00 o'clock in the afternoon, and I stayed on the job until 5:00, which was quitting time, but after we got that screed up there in place, which only had to be this 2x4 carried up and laid down for the steelworkers to hang their steel on, we had about all of our work done for the rest of the day, and I stayed there until 5:00 o'clock, which we'd do in case something else comes up and the steelworkers wants anything to do—anything extra done." (See Tr. 33.)

It is to be noted that there was no unusual incident alleged and that the employee was able to continue with his work for the rest of the day. He merely contends that his back hurt him in lifting up a light piece of dry spruce with another man, work which is certainly normal and usual for a carpenter to perform.

The only other testimony in regard to the alleged injury is in the form of an affidavit submitted by one William McCurry which merely stated that the applicant's account of the incident was true according to McCurry's recollection.

Under cross-examination, Oxford admitted to prior back difficulties while he was employed at Adak approximately two years previous to the above quoted incident. He stated:

"A. I was carrying a 16 foot tank stave on my back and a puff of sudden dust went in and

knocked it off and gave me a slight muscular strain, and my foreman, Mr. Kobaba—he seen me drop the timber and he asked me if it hurt me, and I said, ‘Oh, nothing to amount to anything—just a little jerk.’ I said ‘It will be all right’, and he said ‘You’d better go and report it’, and I went to the office and reported it and they were fixing to take another man down to the infirmary for treatment to an injury that he had, and the man in charge of the First Aid Station told me I ought to go down there and see if they wanted to do anything for me. They never X-rayed me or done anything only give me some tablets or pills, or something or another. The medical officer told me that they would ease pain, and if I needed them to take them, and I don’t recall whether I ever took any of them or not. I don’t believe I did.”

Q. I mean, did you subsequently go back to the infirmary after that initial visit?

A. A day or two later, yes sir.

Q. Why did you go back to the infirmary?

A. The foreman told me to—to check on it.

Q. How were you feeling at that time?

A. Oh, I was feeling all right. The muscles seemed like that they were slightly sore, but I never did go on light work or anything like that. I went ahead with my work, which was heavy work.

Q. I believe you said your back was sore and hurting you a little bit?

A. The muscles, yes sir.

Q. In other words, if you bent over or moved from side to side you could feel it?

A. Yes sir, just more of a muscle strain. It wasn’t anything serious. I didn’t think it was necessary to go down to the infirmary at the

start, but they said it was the regulations that the Navy had there.

Q. How long did this muscular soreness, or strain, or the nerve or muscle, whatever it was,—how long did that continue? Do you recall?

A. Four or five days." (Tr. 34, 35.)

On the basis of this evidence, the Board certainly was entitled to weigh all the testimony and could well have concluded that there was no accidental injury as required by the Alaska Workmen's Compensation Act, Section 43-3-38 ACLA 1949, which provides:

"The term 'injury' or 'personal injury' means an injury by accident arising out of and in the course of employment . . ."

This finding of the Board is further bolstered by the Veterans Administration doctors who finally operated on Mr. Oxford. The conclusion of the Veterans Administration report was that a herniation, nucleus pulposus, lumbar, was not found at surgery. In other words, the surgery did not reveal any herniated disc. The actual condition which was found was "unstable lumbosacral joint—treated operated improved." (Tr. 47.) Moreover, Dr. Martini stated as follows:

"Q. At the time of surgery did Mr. Donald Oxford, the condition of Mr. Donald Oxford, show a ruptured disc?

A. No, it did not." (Tr. 48.)

and

"Q. In place of a ruptured disc what was found at surgery as far as the diagnosis No. 1 under Final Diagnosis is concerned?

A. So far as encountering at surgery a fresh disc herniation which could be removed as such, we found instead marked instability of the fourth lumbar vertebra and some instability of the fifth." (Tr. 49.)

Dr. Martini testified further:

"A. . . . The presence of the loose vertebral segment as found at surgery we *cannot relate specifically to any injury. Usually it's a congenital sort of thing.* (Emphasis ours.)

Q. In other words, the loose segments themselves are a more or less of a congenital type of thing, is that true, Doctor?

A. That's our opinion." (Tr. 51.)

Dr. Martini also quoted from the clinical report of Dr. Stole which stated in part:

"... utilizing the standard lumbosacral incision, and the sinous process of L-5 and a part of L-4 was removed. A thorough exploration of the fourth and fifth interspaces was carried out. No pathology was found. It was noted that there was marked instability of L-4 and some instability of L-5. No disc was seen that was abnormal. The operation was then turned over to Dr. Martini for spinal fusion." (Tr. 55.)

From the testimony as quoted above, the Board had ample evidence upon which to reach its conclusion that Mr. Oxford did not sustain an injury arising out of and in the course of his employment. Appellant emphasizes certain portions of Dr. Martini's testimony. It, of course, was up to the Industrial Board to evaluate that testimony and to make its

findings based on it and other evidence. If the testimony is subject to two constructions, an appellate court will adopt the construction placed upon the testimony by the Industrial Board and the testimony quoted above would appear adequately to substantiate the decision reached by the Board.

Moreover, the sections of Dr. Martini's testimony upon which appellant appears to rely would not be regarded as justifying an award under most compensation decisions. In answer to questions by appellant, Dr. Martini stated:

"A. Well, I certainly think *it's possible* that Mr. Oxford did incur some type of back injury, a lifting mishap.

A. . . . he *could have* incurred some type of injury.

A. Anything *could have* happened at that time—we don't know.

A. *It's conceivable . . .*" (Emphasis ours.) (Tr. 56, 57.)

It is well recognized that such statements as "it's possible", "it could have" "it's conceivable", do not furnish a basis for attributing a disability to an accidental injury and, in many instances, Board decisions based on such testimony have been overruled. See *John H. Green's Case*, 165 N.E. 120, 266 Mass. 355; *Luckenbill v. Philadelphia R. Co. & I. Co.*, 93 Pa.S. 438. But in the subject case it is not necessary to determine whether evidence, when viewed in

its most favorable light, would justify a decision for the appellant. The problem on review is whether or not there was any basis for the Board's decision denying compensation.

In a case closely akin to the one at bar, that of *Mancuso v. Mancuso*, 27 A. 2d 779, wherein an employee alleged a back injury from lifting bags of cement weighing 94 lbs. each, the court held:

“Claimant's disability is not compensable unless the result of an accident in the course of his employment. *Crispin v. Leedom & Worrall Co. et al*, 341 Pa. 325, 328, 19 A.2d 400. The burden was on claimant to show by competent evidence that this disability was accidental and not from natural causes or from the normal progress of his condition. *Mooney v. Yeagle et al*, 107 Pa. Super. 409, 415, 164 A. 82; *Gausman v. R. T. Pearson Co.*, 284 Pa. 348, 354, 131 A. 247; *Monahan v. Seeds & Durhan et al*, 336 Pa. 67, 71, 6 A.2d 889. It was for the board as the final fact-finding body to determine from all the evidence whether claimant had sustained the burden resting upon him, and its findings that he had not is a pure finding of fact. *Frederick v. Berwind-White Coal Mining Co. et al*, 115 P. Super. 581, 584, 585, 176 A. 60; *Corrento v. Ventresca et al*, 144 Pa. Super. 358, 363, 19 A.2d 746. Although the board was not bound to accept the testimony of claimant and his physician (*Bakaisa v. Pittsburgh & West Virginia R. Co.*, Pa. Super., 27 A. 2d 769), their testimony sustains the findings of the board . . .

“Claimant is suffering disability from his present pathological condition, but we agree that the

record presented to us fails to establish that such disability is due to an accident sustained in the course of his employment rather than from the normal progress of his pre-existing physical condition.”

Similarly, in the case of *Matczak v. Goodyear Tire & Rubber Co.*, 139 Ohio St. 181, 38 N.E. 2d 1021, where an employee was lifting bags of lamp black weighing from 25 to 150 lbs., and contended that as he lifted a bag he felt a catch or snap in his back, it was held by the Supreme Court of Ohio:

“A majority of this court is of the view that the record fails to disclose evidence of an injury accidental in origin and cause. There was nothing unusual about the plaintiff’s work except the single fact that one end of the upright bags of lampblack dust was somewhat lower than on previous occasions.”

In the case of *Williams v. New Bethlehem Burial Service*, 74 A. 2d 677, 167 Pa. S. 364, an employee contended that he sustained a back injury while lifting the dome of a vault. The court held:

“‘It was for the board as the final fact-finding body to determine from all the evidence whether claimant had sustained the burden resting upon him, and its finding that he had not is a pure finding of fact . . .’ Here, as there, 150 Pa. Super. at page 25, 27 A.2d at page 781: ‘Claimant is suffering disability from his present pathological condition, but . . . the record presented to us fails to establish that such disability is due to an

accident sustained in the course of his employment rather than from the normal progress of his pre-existing physical condition.

‘Where the triers of the facts refuse to find facts in favor of the party having the burden of proof, the question on review is not whether competent evidence would sustain such a finding if made, but whether there was a capricious disregard of competent evidence in the refusal so to find. *Kline v. Kiehl*, 157 Pa.Super. 392, 43 A.2d 616.’ ”

See also:

In Doyle's Case, 269 Mass. 310, 168 N.E. 798;
Wenzel v. J. W. Kiesling & Son, 11 N.Y.S. 2d 877.

In the case of *Palmer v. Knapp Monarch Co.*, 247 S.W. 2d 341 (Mo.), the Board found that the employee did not sustain an accident arising out of and in the course of her employment so as to cause the injury complained of. The appellant claimed that she hurt her back in the act of moving boxes of heavy materials away from a press on which she was employed. The court stated:

“In construing this statute the courts have held that the injury itself does not constitute the ‘event’ or ‘accident’ but that in cases of this kind where an employee is injured as a result of exertion in lifting or pulling upon some object, there must be some unusual occurrence, such as a slip, or fall, or abnormal strain as a result of an unforeseen event, in order to bring the person

injured within the coverage of the act. (Cases cited.)”

See also:

Stalling Bros. Feed Mill v. Stovell, 254 S.W. 2d 460, 221 Ark. 541.

In *Lindia v. Walsh-Kaiser Co., Inc.*, 73 A. 2d 765 (R.I.), the employee was operating a larger type Gantry crane and felt a pain in his back while operating the brakes in the ordinary manner. The trial justice held that the injury was not the result of an accident and the appellate court sustained, holding that there was legal evidence to support the findings and stating:

“It appears from the transcript that petitioner was performing his regular work in the usual manner . . . and that he did not twist or slip or fall. There is no evidence of any unusual condition or abnormal exertion on the part of the petitioner.”

In *Morrell v. E. Turgeon Construction Co.*, 68 A. 2d 23, (R.I.), an employee was one of five or six carpenters who were ordered to move a heavy sink. The trial court found that he did not sustain a personal injury by accident arising out of and in the course of his employment, and the Supreme Court of Rhode Island on appeal stated:

“Therefore, in the instant case, even though a contrary view might be equally reasonable, we cannot disturb the trial court’s finding upon conflicting evidence that the petitioner did not sustain an injury to his back by accident.”

See also:

Spolidoro v. United States Rubber Co., 50 A. 2d 773, 72 R.I. 269;

Parente v. Apponaug Co., 57 A. 2d 168, 73 R.I. 441, and

Taci v. United States Rubber Co., 58 A. 2d 921, 74 R.I. 113.

In *Caled Products Co. v. Sausser*, 86 A. 2d 904 (Md.), the employee lifted a drum containing liquid soap. As he stooped to pick up a carton he was seized with a severe pain in his back. The X-rays did not reveal any traumatic injury but did reveal an arthritic condition. The claimant underwent an operation. The Court of Appeals of Maryland held:

“In the case before us there was no unusual condition in the employment when claimant was seized with the disabling pain. The work he was performing was the customary work he had been doing ever since he had started working for the company in 1945.”

In the case of *Baston v. Stohr & Fister*, 30 A.2d 640, 151 Pa. S. 618, it was held that the evidence supported the finding of the workmen's compensation board to the effect that the employee did not suffer an accidental injury while carrying a stove between floors, the court stating:

“... the question before the court is whether the board's findings of fact . . . can be sustained without a capricious disregard of the competent evidence. Unless the answer is in the negative, the order must be affirmed.”

In *Toohey v. Carnegie Coal Corp.*, 28 A. 2d 362, 150 Pa. S. 297, a coal miner stooped to walk through a trap door leading from one section of the mine to another while carrying a jack and dinner bucket. He alleged that he felt a sharp pain in his hip and upper leg. One doctor testified that he had sustained a sprain of the muscles of his back and concluded that his condition was the result of the "accident". Although the workmen's compensation board had made an award in this case, the appellate court reversed, holding:

"Under this decision an accident cannot be inferred from an injury alone; there must be other evidence direct or circumstantial. And this court, following this decision, has held that a statement by the claimant that he 'twisted' himself, is not enough."

The Supreme Court of North Carolina had occasion to affirm a decision of its compensation board denying compensation to a cotton mill employee who claimed that she injured her arm and shoulder while stretching sheets. The court concluded:

"After a review of the entire record and the evidence properly considered by the Commission, we are of the opinion that the findings and conclusions of the Commission were supported by evidence and are binding upon the court. The evidence permits the inferences therefrom which were drawn by the Commission though other inferences appear equally permissible."

See:

Johnson v. Erwin Cotton Mills Co., 59 S.E. 2d 828, 232 N.C. 321.

In *Thomson v. Garten*, 58 N.E. 2d 942, 115 In. A. 330, a situation very closely analogous to the subject case was involved. An employee was a feed salesman and, in selling feed to a circus, he alleged that he jarred or strained his back in leaving one of the circus cars. Thereafter he received treatment for his back and eventually was X-rayed, disclosing that he had a metastatic carcinoma from which he subsequently died. The appellate court held that there was sufficient evidence to sustain the finding and award of the Industrial Board denying compensation.

In *Buettner v. Industrial Commission*, 59 N.W. 2d 442, 264 Wisc. 516, the claimant sought to recover compensation for a back injury which he alleged was caused by the cranking of a heavy motor at a saw-mill. The court stated:

“We have read the doctor’s testimony in its entirety and are of the opinion that the Commission’s finding that the incident upon which appellant predicated his injury did not constitute an accident arising out of the employment—is supported by the evidence. It is clear from the doctor’s testimony that no one could evaluate the effect of the stress and strain involved in appellant’s work with respect to his disability. Dr. Quade himself could make no such evaluation, and while it was obvious that the cranking of the motor *could* cause a disc protrusion, there was no evidence that it actually did. The degenerative condition had existed for months before; appellant had engaged in previous employment which had subjected his back to stresses and strains; he had been employed at the saw-

mill for less than ten days when the disability occurred. It is clear that, with the condition that appellant's back was in for months prior to the disability, almost any exertion could have caused the disc to protrude. The incident which appellant contends produced the disability cannot be termed 'accidental,' and we find nothing in the record to compel a finding that the disability arose out of appellant's employment."

In *Hubble v. Kold-Hold Mfg. Co.*, 33 N.W. 2d 84, 321 Mich. 567, a claim for a back injury alleged to have resulted from a strain was denied, the court stating:

"The Commission made the following finding: 'We find that plaintiff did not sustain a personal injury arising out of and in the course of his employment by the Kold-Hold Mfg. Co. on September 6, 1945, and is therefore not entitled to compensation benefits.'

"There is testimony in the record as well as inferences properly drawn from all of the testimony which amply support the above finding of the Commission."

In *Williams v. New Bethlehem Burial Service*, cited supra, a claim for back disability which the employee contended was due to lifting the dome of a burial vault was denied on the ground that the disability resulted from a congenital formation of the back and not from an accident, just as in the subject case Mr. Oxford's disability resulted from a congenital loose vertebral segment rather than to an accidental injury.

Among the numerous decisions upholding compensation boards' denial of claims based on alleged back injuries where no unusual strain, twist or fall was involved, are the following:

Tickles v. E. I. duPont de Nemours & Co., 191 So. 764 (La.);

Waites v. Briggs Mfg. Co., 273 N.W. 441, 280 Mich. 185;

Jack v. International Paper Co., 56 So. 2d 875 (La.);

Smith v. Packer Displays, Inc., 67 So. 2d 323 (Fla.).

The Board's finding that Oxford did not sustain an accidental injury arising out of his employment and that his disability was not attributable to any such injury, is clearly borne out by the evidence. An argument may well be made that the evidence, if construed in a different light, might substantiate a contrary finding by the Board. This was a matter peculiarly within the province of the Board's powers and, as indicated by the numerous decisions involving identical circumstances, appellate courts will not reverse where there is evidence upon which the Board based its findings. The list of cases cited above could be expanded to an almost indefinite length but an effort has been made to cite cases dealing with similar disabilities to that involved in the subject case. It is respectfully submitted that there is evidence to substantiate the Alaska Industrial Board's decision affirmed by the United States District Court for the District of Alaska that Oxford did not sustain

an accidental injury in the course of his employment with the Carson Construction Company, and that any disability suffered by him was not attributable to such an injury. In the alternative, it is submitted that since the Board's findings, to the effect that there was no accidental injury arising out of employment and no disability attributable to such injury, are negative ones, they were not made with a capricious disregard of competent evidence; and, accordingly, the decision of the learned judge of the United States District Court should be affirmed.

II.

SINCE OXFORD'S DISABILITY WAS UNRELATED TO HIS EMPLOYMENT, THE BOARD'S DECISION DENYING COMPENSATION SHOULD BE AFFIRMED REGARDLESS OF WHETHER OR NOT OXFORD REASONABLY BELIEVED THAT ANY OPERATION WAS NECESSARY.

Once the conclusion is reached that the Board was justified in its decision that Oxford did not sustain an accidental injury arising out of and in the course of his employment, and that the learned district judge was justified in his decision to the effect that there was substantial evidence upon which the Board based its findings, the other questions raised in appellant's brief become moot. Under no compensation theory could an employer be held responsible for an operation, based on the employee's "reasonable belief" that it was required by an injury, when a decision had been rendered to the effect that the employee

had not suffered an accidental injury arising out of and in the course of his employment.

Counsel devotes most of his brief to discussing common law injury situations, and situations not very closely analogous to the subject case. He cites cases to the effect that an injured person is required to mitigate his damages by securing reasonable medical care. From this, he passes to compensation cases wherein it is held that an employee must submit to reasonable medical treatment. It is submitted, however, that learned counsel is in error in contending that an employee is required to submit to a back fusion operation such as that performed on Mr. Oxford, as the weight of authority appears to hold that an employee cannot be required to submit to such an operation and cannot be prejudiced by reason of his refusal so to do. See *U. S. Coal & Coke Co. v. Lloyd*, 203 S.W. 2d 47, 305 Ky. 105; *Alexander v. Chrysler Motor Parts Corp.*, 207 P. 2d 1179, 167 Kan. 711; *Mietkiewski v. Wayne County Road Comm.*, 198 N.W. 981, 227 Mich. 227; *K. Lee Williams Theatres v. Mickle*, 205 P. 2d 513, 201 Okla. 279; *Gillam v. Workmen's Compensation Appeal Board*, 191 S.E. 204, 118 W.Va. 571; *Sultan & Chera Corp. v. Fallis*, (Fla.) 59 So. 2d 535; *Williams & Copeland, Inc. v. Calvin*, (Okla.) 249 P. 2d 414.

From his statements of law pertaining to mitigation of damages counsel attempts to draw the conclusion that an employee who reasonably believes he is entitled to an operation automatically is entitled to an award for the period of disability resulting

from the operation, regardless of whether or not it develops that the disability revealed at the time of the operation was unrelated to the employment. Certainly this conclusion is a non sequitur, and particularly so under the circumstances of the subject case. The employer in this case authorized one operation and only one operation. That was the operation for a lipoma performed by Dr. Hoge. In authorizing that operation, the employer made it clear that it denied any liability to the employee but that it was authorizing the operation in an effort to amicably settle the dispute. The employee was fully advised by the employer of the employer's position that any disability which was sustained by the employee was not attributable to an accidental injury arising out of and in the course of his employment. After such notification, the employee, on his own initiative, undertook treatment by the Veterans Administration physicians, and it was the employee's decision to secure such an operation after being advised by the employer that, in the employer's opinion, his disability was not attributable to any accidental injury arising out of his employment. The operation established that appellant's condition was due to a congenital abnormality and, with ample justification, the Alaska Industrial Board concurred with the employer's position that the disability was not attributable to an injury arising out of the employment. The employee endeavors to circumvent this opinion by stating that he reasonably believed the operation was attributable to an injury arising out of and in

the course of his employment and that, accordingly, the disability suffered by the operation should be compensable. It would appear that the statement of this proposition answers itself as, if that were the law, all that would be required for an employee to obtain compensation for conditions totally unrelated to any industrial injury would be for him to maintain that he "reasonably believed" the operation was required by the injury.

In addition to the numerous cases cited by counsel on matters not relevant to the particular point upon which he relies, three cases are cited touching on the proposition that reasonable belief in regard to the needed surgery warrants compensation for disability resulting from the surgery. Of these three cases, only one is really directly in point, and that is the case of *Merriman v. Industrial Comm.*, 210 P. 2d 448 (Colo.). This case was decided by a divided court and involved an appeal from a commission finding in favor of the employee. Had the commission found that the employee had not sustained an accidental injury, or had the commission found that his disability was not attributable to that injury, it is submitted that the appellate court would not have decided in favor of the employee.

The other two cases cited by counsel are the cases of *Vanecek v. Greeley Square Building Corp.*, 104 N.Y.S. 2d 214, 278 App. Div. 869, and *Thomas v. B. & F. Polishing Co.*, 104 N.Y.S. 2d 294, 278 App. Div. 880. Both of these cases involve substantial injuries

to employees requiring exploratory operations. There was no question in either case but that the operation was required as a result of the injury sustained by the employee. The decision in each case is not based on any conclusion that the employee "reasonably believed" that the operation was required by the injury, but rests on much more solid basis to the effect that "the operation was necessitated by the accident." In the *Vanecek* case the "purpose of the operation was to determine the effect of the injury and the surgeon concluded that death resulted from the surgery." The exact same situation was involved in the *Thomas* case.

In the subject case, in contrast to this situation, the operation was not necessitated by any injury sustained by Oxford but was required by a long standing disability attributable to a congenital condition.

In any event, the question as to whether disability resulting from an operation is compensable as having been caused by an injury arising out of and in the course of the employee's employment is one of fact to be resolved by the Board.

"That the disability or death for which compensation is claimed resulted from a compensable injury is an essential element of the claimant's case, and the burden rests upon the claimant, therefore, to prove such fact by competent evidence. The burden of showing that a pre-existing infirmity or diseased condition was aggravated by the injury complained of rests upon the claimant . . ."

58 *Am. Jur.* 859.

The Board in the subject case has found that Oxford's disability is not attributable to his alleged accidental injury.

The situation at bar is fairly similar to that of the case of *Newton v. State Industrial Accident Commission* decided by the Supreme Court of California and reported in 267 P. 542. In that case an employee, while running in the course of his employment, felt his knee snap. This resulted in a fracture of the patella of the left knee and there was evidence to the effect that the injury was a spontaneous one and not attributable to any extraordinary strain or trauma. The Industrial Accident Commission held:

"The evidence does not establish that said fracture was caused by injury or strain arising out of or occurring in the course of his employment."

The California Supreme Court, in affirming, stated:

"In other words, the finding of the commission is that the injury to the minor resulted from an inherent defect in the patella, although the record does not show any previous diseased condition of the patella, or that the petitioner had experienced any previous trouble therewith. The finding can only be interpreted in the light that the injury resulted from an inherent defect, and not through any extraneous, accidental, or inducing cause, and therefore did not arise out of the course of the minor's employment, or by reason of his employment, but simply occurred during the course of, or time of, employment. It would appear that the theory of the commission was and is that the injury complained of is a matter

which would come, probably, under health insurance, and not under the provisions of 'the Workmen's Compensation, Insurance and Safety Laws.' . . . While the word 'accident' has been eliminated from Sec. 6 of 'the Workmen's Compensation Act' (Stat. 1917, p. 834), the phrase 'arising out of and in the course of the employment' has been interpreted to mean that the injury must result by reason of the employment in which the employee is engaged, and not by reason of some inherent natural defect which simply culminates during the time of employment. In other words, if the agency which culminates in a physical injury is an inherent defect, and not an outside cause, or if the injury is not superinduced by some extraordinary movement or action, compensation is not allowable. Again, as stated in *William Simpson Constr. Co. v. Industrial Acc. Commission*, 74 Cal.App. 239, 240 Pac. 58: 'In the first place, the burden of proof is upon the applicant to prove that the injury received was one which would sustain an award. "It must be conceded that the burden is upon the applicant for compensation to show that the injury arose out of as well as in the course of the employment; and there is no presumption, as contended by respondents, that because an injury occurs in the course of the employment it arises out of or because of that employment." ' *George L. Eastman Co. v. Industrial Acci. Commission*, 186 Cal. 587, 200 Pac. 17.

“Again, (the district court of appeal) is not in a position to draw its own inferences from the

testimony set forth in the record and conclude therefrom that the petitioner is or is not entitled to compensation. Our jurisdiction extends only to the ascertainment of whether there is testimony in the record, and was testimony before the commission supporting its findings.

“It being a question of fact as to whether the injury to the petitioner arose out of or in the course of his employment, or was simply spontaneous, and occurred during the time of his employment, and that fact being found adversely to the petitioner’s contention, and being based upon the expert testimony to which we have referred, supports the findings of the commission, and being a question of fact determined by the commission, cannot be disturbed upon appeal. The only question of law involved herein is as to whether there is any testimony supporting the finding of the commission, and, having found such testimony, our inquiry there stops.”

Similarly, in the case at bar, the operation which Mr. Oxford underwent was for a condition which did not arise out of and in the course of his employment with Carson Construction Co. The condition discovered and corrected by means of the operation was a congenital one and, as found by the Alaska Industrial Board, not attributable to any injury of the disc or bony structure. The Board’s finding that the operation was not attributable to any accidental injury arising out of and in the course of Oxford’s employment with the Carson Construc-

tion Co. is amply supported by the evidence herein, the doctor who performed the operation stating:

“A. . . . The presence of the loose vertebral segment as found at surgery we cannot relate specifically to any injury. *Usually it's a congenital sort of thing.* (Emphasis ours.)

Q. In other words, the loose segments themselves are a more or less of a congenital type of thing, is that true, Doctor?

A. That's our opinion.” (Tr. 51.)

In the case of *Thomson v. Garten* cited supra, where the employee claimed that he jerked or strained his back in leaving a circus car while in the course of his employment and later, after he had been treated for a back disability, it was discovered that he was suffering from a metastatic carcinoma, the evidence was held to sustain the board finding that the cancerous condition was not attributable to the alleged accidental injury and compensation for the death of the employee due to cancer was denied.

Similarly, in *Allen v. Elk City Cotton Oil Co.*, 256 P. 898 (Okla.), it was held that the employer could not be held liable for medical services rendered the employee by a physician other than the one selected by the employer for an ailment other than that resulting from the injuries received by the employee arising out of and in the course of his employment, the court holding:

“The respondents should not be called upon to pay for the services of the physician rendered claimant for causes not connected with the accident.”

In *Citizens Coal Mining Co. v. Industrial Commission*, 135 N.E. 753, 303 Ill. 415, an employee claimed to have sustained an injury in attempting to lift a coal car that was off a track. Approximately seven months later he died as a result of an ulceration and obstruction of the bowels. There was conflicting testimony as to whether this was attributable to the alleged injury. The court held:

“The evidence does not furnish the basis for a reasonable conjecture that he died from an injury received in the mine.”

The problem involved has recently been considered by the United States Court of Appeals for the Fifth Circuit in *Nushinski v. Travellers Ins. Co.*, 190 F. 2d 388. The employee brought suit claiming injury to his lungs alleged to have been suffered while working for a manufacturing company. The Circuit Court held:

“Concluding as we do that the trial judge was right in concluding that the evidence of causal connection between the claimed injury and the alleged disability was not sufficient to warrant submitting the case to the jury, we need not determine whether the evidence of appellant’s wage rate was sufficient to authorize the submission of that issue to the jury.”

In *John H. Green’s Case*, 165 N.E. 120, 266 Mass. 355, the court held:

“The fact that the present condition of the claimant might reasonably result from the injury, or that it was conceivable that this condition might

so result, is not sufficient to justify the conclusion that the condition was causally related to the injury. A mere conjecture or surmise is not proof. There must be evidence to support the finding and the burden was upon the employee to prove his case."

To the same effect is *Kelly v. International Motor Co.*, 205 App. Div. 737, 200 N.Y.S. 804. An employee was operated on for appendicitis and it was discovered that he had a ruptured gastric ulcer which caused his death. Although a physician testified that an accidental injury which the employee had suffered could have caused the condition found, it was held that there was no legal evidence to connect the death with the accidental injury.

A case quite similar to the subject case is that of *Citizens Coal Mining Co. v. Industrial Commission*, 141 N.E. 434, 309 Ill. 473. An employee complained of pain in his back from pushing a car. At the hearing doctors testified that he suffered from an extension of bones of the back attributable to an old infection which had been going on for many years and that the injury was trivial, contributing in no way to the claimant's condition. The commission refused to enter an award for the employee and this decision was affirmed on appeal, based upon the fact that the disability was from a long standing condition causing gradual changes in the spine so that the alleged accident was neither an original or aggravating cause of the applicant's disability.

Another case closely akin to the subject case on its facts is that of *Rosenkranz v. Industrial Commission*, 262 P. 1014, 83 Colo. 123. The claimant was suffering from arthritis of the spine which, according to the medical evidence, would sooner or later produce death. Although there was evidence which, if believed, would have justified a finding that, in addition to the disease, there was a temporary disability caused by a sprain of the sacroiliac joint, the court held that there was no evidence which would compel such a finding and that the sprain caused by lifting could have been a trivial matter, not enough to cause disability in that the progress of the disease could have culminated when it did without the strain.

Even the most liberal authorities on workmen's compensation cases hold that there must be a showing that a disability is caused by the alleged industrial injury before compensation will be allowed. The triers of fact in the subject case have found an absence of such causal relation, the Board having concluded that the disability was not related to an accidental injury arising out of and in the course of employment. This finding of the Board was based on substantial evidence and it is respectfully submitted that that finding cannot be said to have been made with a capricious disregard of the competent evidence. Accordingly, it is respectfully submitted that this learned court should affirm the decision of the Alaska Industrial Board, as did the learned judge of the United States District Court.

CONCLUSION.

There was no showing by Oxford of any accidental injury arising out of and in the course of his employment since the most that his testimony indicated was that he stated that his back hurt while performing his normal work in the normal manner. The evidence indicated that the disability from which Oxford suffered was not attributable to any injury but was due to a long standing degenerative condition together with a congenital instability of the back. There being substantial evidence on which the Board found that there was no accidental injury arising out of Oxford's employment and that Oxford's disability was not attributable to any such accidental injury; and such finding not having been made with a capricious disregard of competent evidence, it is respectfully submitted that the decision of the court below should be affirmed.

Dated, Juneau, Alaska,
March 29, 1955.

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No. 14687.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SHELLY FISHER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court for the
Southern District of California Central Division

APPELLANT'S OPENING BRIEF.

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UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court for the
Southern District of California Central Division

APPELLANT'S OPENING BRIEF.

Jurisdictional Statement.

This is an appeal by Shelly Fisher from a judgment of the District Court of the United States for the Southern District of California, convicting appellant of violating Section 174 of Title 21 of the United States Code. Appellant was convicted of two separate violations as charged in Counts Three and Four of the Indictment. Appellant was sentenced to 5 years imprisonment on Count Three and 5 years imprisonment on Count Four, said sentences to run consecutively. Appellant was also ordered to pay a fine of \$25.00 on each of the two Counts.

The District Court had jurisdiction by virtue of the provisions of Title 18 of the United States Code, Section

3231, which give the District Court of the United States original jurisdiction of all offenses against the laws of the United States. Appellant was prosecuted under an Indictment which alleged violations of a law of the United States. The Indictment [Clk. Tr. pp. 1-4] charged two violations of Title 21 of the United States Code, Section 174, and alleged in Count Three that on or about the 22nd of July, 1954, in Los Angeles County, California, within the Central Division of the Southern District of California, appellant and defendant Shurley Oliver Burse, after importation, did knowingly and unlawfully sell and facilitate the sale of approximately 92 grains of heroin, a narcotic drug, to Malcolm P. Richards, which heroin, as appellant then and there well knew, had been imported into the United States contrary to law. Count Four of the Indictment alleged that on or about July 22, 1954, in Los Angeles County, California, within the Central Division of the Southern District of California, appellant did, after importation, knowingly and unlawfully receive, conceal and facilitate the transportation of, approximately 450 grains of heroin, a narcotic drug, which said heroin, as appellant then and there knew, had been imported into the United States of America contrary to law.

Appellant pleaded not guilty [Clk. Tr. p. 6] and, after a trial by the court without a jury, a jury having been waived, appellant was adjudged guilty as charged in Counts Three and Four of the Indictment.

The United States Court of Appeals has jurisdiction of appellant's appeal by virtue of the provisions of Title 28 of the United States Code, Section 1291, which give the United States Court of Appeals jurisdiction of appeals from all final decisions of the District Courts of the United States.

The judgment of conviction and sentence [Clk. Tr. pp. 26-27] is a final decision of the United States District Court. This appeal is taken to the United States Court of Appeals for the Ninth Circuit by virtue of the provisions of Title 28 of the United States Code, Section 1294.

Statement of the Case.

No attempt will be made to relate the testimony of the individual witnesses for the government. In substance the evidence for the government was as follows: On the morning of July 22, 1954, a narcotics agent met with two deputy sheriffs of the Los Angeles County Sheriff's Department and jotted down on a piece of paper the serial numbers of \$175.00 in bills of \$20.00, \$10.00, and a \$5.00 bill. Thereafter, at about 8:30 A. M., a Federal narcotic agent went to the home of defendant Shurley Burse and after Burse had made and received a telephone call, gave Burse \$155.00 of the \$175.00. The agent then drove Burse, at about 9:30 A. M. of the same day, to the vicinity of 35th Place and Denker Avenue; that Burse left the car and later returned to the car and handed the agent a brown paper in which there was a white envelope containing heroin; that the agent then drove Burse to 20th and Compton Avenue and placed him under arrest. Shortly thereafter, Burse was searched and a \$20.00 bill and a \$5.00 bill, which were part of the original \$155.00 given to Burse was taken from his person. Burse was then driven to the vicinity of 2430 Rimpau Boulevard and there Burse pointed out a 1941 Packard automobile. Thereafter, Burse was taken to the corner of Normandie and Adams Boulevard and after spending some time there, Burse made a telephone call and the officers overheard Burse call the name of Shelly and the man on the other

end of the telephone stated "36th and Ninth Avenue." Burse was then driven to 36th and Ninth Avenue where Burse entered an automobile driven by appellant. The officers followed this automobile, overtook the same and placed appellant under arrest.

Before the time that Burse got into the automobile with appellant at 36th and Ninth Avenue, appellant was observed to get into the Packard automobile in front of 2430 Rimpau Boulevard and drive away. Appellant was also seen to go into an apartment building at 28th and Montclair Streets. Appellant was stopped in his automobile and placed under arrest at 23rd and 6th Avenue. Appellant was searched and \$128.00 and some cents found on his person. Of this sum, \$120.00 consisted of part of the \$175.00 in bills, the serial numbers of which had been taken down by the officers.

Keys were taken from appellant by the federal agents and they took one key and went to the apartment building at Montclair and 28th Street, and found that the key fit a particular lock to a door in the apartment building. The agents then went back and brought appellant to this apartment in the apartment building and used the key, entered and carried appellant into the apartment. This apartment was searched and the federal agents found in the apartment the heroin referred to in Count Four of the Indictment. The officers remained in the apartment for about five or six hours and at the end of that time, a Flora Frazier came to the apartment from work. Said Flora Frazier was the occupant of the apartment and she testified that she had given appellant a key in order for appellant to do some painting in the apartment for her. Another key was kept under the mat in front of the apart-

ment door to be used by a neighbor to come in and make telephone calls. While the federal agents were in the apartment, the neighbor started into the apartment to make a telephone call.

Appellant denied having any knowledge of the narcotics found in the apartment. Defendant Burse testified that the narcotics in the apartment belonged to him and that he had not purchased any narcotics from appellant. Defendant Burse also testified that of the \$155.00 given him by the agent, he gave \$125.00 to appellant as part repayment on previous loans made from appellant. Burse also testified that he had agreed to help appellant with the painting and cleaning work in the apartment and had taken the narcotics to the apartment without any knowledge of his act on the part of appellant. Appellant testified that he knew nothing about the narcotics in Mrs. Frazier's apartment, and that he had not let Burse have any narcotics and that the money found on him by the agent was money that Burse had given to him for previous loans.

Specification of Errors.

Appellant urges the following points for reversal of the judgment of conviction:

I. The evidence is insufficient to sustain the judgment of conviction on either Count Three or Count Four and the trial court erred in not granting appellant's Motion for Acquittal.

II. The evidence against appellant on Counts Three and Four was obtained through illegal search and seizure.

ARGUMENT.

I.

The Evidence Is Insufficient to Sustain the Judgment of Conviction on Either Count Three or Count Four and the Trial Court Erred in Not Granting Appellant's Motion for Acquittal.

At the conclusion of the government's case, appellant made a motion for judgment of acquittal. [Rep. Tr. p. 205.] Appellant's motion was denied by the trial court. [Rep. Tr. p. 214.] Appellant's motion should have been granted as the government's evidence was insufficient to sustain appellant's conviction on either Count Three or Count Four.

With respect to Count Three of the Indictment, which may be referred to as the "Sales Count," the evidence merely establishes that defendant Burse made a sale of narcotics to Agent Richards. There is no evidence in the record which establishes that appellant supplied Burse with the narcotics which Burse sold to Agent Richards. Some circumstantial evidence was offered but it is clearly insufficient. The transaction of sale between the defendant Burse and Agent Richards on the morning of July 22, 1954, was completed by 10:20 A. M. Prior to, and at that time, there is no evidence pointing to appellant's participation in this transaction. Later in the afternoon, Burse meets appellant, gets into appellant's car and appellant is then overtaken and arrested. No narcotics were found in appellant's possession. The presence of \$120.00 of marked money on appellant is merely a suspicious circumstance, but is insufficient to prove appellant's guilt beyond a reasonable doubt.

The evidence against appellant with respect to Count Three is not unlike the evidence against defendant on Counts 13, 14 and 15 of an Indictment in the case of *United States against Pisano*, 193 F. 2d 355. In the *Pisano* case, the evidence with respect to Counts 13, 14 and 15 of the Indictment there involved established that on June 24, 1949, one Taylor, after having met Bowman at 47th and Prairie Avenue, Chicago, was driven in the vicinity of the Cook County Hospital. Bowman, after receiving \$150.00, left the car and returned a short time later and handed Taylor a package. Although defendants Pisano and Ginnone were seen in the vicinity in a light green automobile and at various places in and about where Taylor and Bowman appeared, there was no evidence that Bowman, at that time, made any contact with either Pisano or Ginnone. Accordingly, the Court of Appeals stated that the evidence was insufficient to support a verdict upon the counts of the Indictment relating to that incident.

The rule of law is clear that in order to find a defendant guilty on circumstantial evidence alone, the proved circumstances must not only be consistent with the hypothesis that the defendant is guilty of the crime, but the proved circumstances must be irreconcilable with any other rational conclusion. This rule was stated in *Stoppeli v. United States*, 183 F. 2d 391, at page 393 as follows:

“We may say that the evidence is insufficient to sustain the verdict only if we can conclude *as a matter of law* that reasonable minds, as triers of the fact, must be in agreement that reasonable hypotheses other than guilt could be drawn from the evidence.”

Likewise, the evidence is insufficient to convict appellant of Count Four of the Indictment. It will be pointed out

under Point II of the Argument that the government's evidence relating to Count Four was obtained through an illegal search and seizure, but even assuming that the evidence was not so obtained, it is still insufficient to sustain appellant's conviction. The narcotics involved in Count Four of the Indictment were found in an apartment to which appellant possessed a key. However, the evidence established that the apartment was occupied by one Flora Frazier and that appellant had a key for the purpose of doing certain work in the apartment. The evidence also established that other persons had access to the apartment because of a key which was kept under the mat in front of the door. Other persons having gone to and from the apartment, as established by the evidence, were Sally Frances Sheffield and her husband. Appellant denied any knowledge of the existence of narcotics in the apartment. Flora Frazier, the occupant of the apartment, and Sally Sheffield likewise denied any knowledge of the narcotics found in the apartment.

It is significant that the government did not produce Mrs. Sheffield's husband who was one of the persons proved to have gone in and out of the apartment. Defendant Burse admitted that the narcotics found in the apartment belonged to him and exonerated all other persons, including appellant.

Had the trial court believed appellant's testimony and that of defendant Burse, appellant's conviction could not have resulted. But even if the trial court disbelieved the testimony of Burse and appellant, this disbelief is not affirmative evidence of appellant's guilt. At best, the government's evidence established that defendant Burse was the only individual who had possession of any nar-

cotics. The circumstances that narcotics were found in an apartment to which appellant had access becomes meaningless in the face of the evidence that other persons also had access to this apartment. Under the doctrine of the *Stoppeli* case, the circumstances were not inconsistent with the innocence of appellant and, hence, insufficient to establish appellant's guilt beyond a reasonable doubt.

With respect to both Counts Three and Four, appellant is entitled to the benefit of the rule so aptly expressed in *People v. Hill*, 77 Cal. App. 2d 287, as follows:

“ . . . By all the evidence favorable to the state's contention nothing was established but a suspicion of appellant's guilt. The testimony of the People's witnesses is devoid of act or word that may be interpreted as competent proof of a crime. If the trial court had believed the two convicts and appellant, the latter's conviction could not have resulted for they completely exculpated him. If it disbelieved them, as of course it was privileged to do, a conviction was out of the question, for the record discloses that the total of the state's evidence is wanting in the essentials of proof of an established crime. To suspect an accused is the privilege of the prosecutor, judge or laymen when he has been found in the company of criminals. But to put the brand of infamy upon a person because he has been brought to the bar can find no justification in law or morals. To do so is to disregard legal principles long cherished. Appellant entered the courtroom clothed with the assumption of innocence which shielded him until his guilt was established beyond a reasonable doubt. . . . ”

People v. Hill, 77 Cal. App. 2d 287, 292.

II.

The Evidence Against Appellant on Counts Three and Four Was Obtained Through Illegal Search and Seizure.

Appellant's conviction cannot stand because the Government's Exhibits 6, 7, and 8 were all secured by an illegal search and seizure. These exhibits were obtained by an illegal search of the premises at 3809 $\frac{3}{4}$ Montclair. The search of this apartment was without a warrant and violated the provisions of the 4th Amendment to the United States Constitution.

There is no dispute that appellant was arrested in an automobile at 23rd and 6th Avenue, and placed under arrest at that point. [Rep. Tr. p. 96.] Appellant was then taken to Montclair and Adams. [Rep. Tr. p. 100, line 1.] The agents then took keys from the appellant, including a key which the agents used to open the door of the apartment at 3809 $\frac{3}{4}$ Montclair. This apartment was then searched in the absence of the occupant, Flora Frazier, without a warrant and Government Exhibits 6, 7 and 8 were found and seized. That the search of Mrs. Frazier's apartment and the seizure of Exhibits 6, 7 and 8 violated the 4th Amendment to the United States Constitution is not open to question.

The case at bar is similar to that of *United States v. Jeffers*, 342 U. S. 48. In the *Jeffers* case, government officers, without a warrant for either search or arrest, but with reason to believe that defendant had narcotics unlawfully concealed in a hotel room, entered the hotel room of the defendant's aunts, and in their absence and even in the absence of defendant, entered the room and seized narcotics found there. This search of a room not

occupied by a defendant was held to be a violation of the 4th Amendment and the Supreme Court held that the narcotics so seized should have been excluded as evidence in the defendant's trial for violation of the narcotic laws.

Even though there is a right to search a man's dwelling incidental to an arrest, this right cannot extend to the search of a man's dwelling several blocks distant to the place of arrest. This was so held in *Agnello v. United States*, 269 U. S. 20.

In *United States v. Lee*, 83 F. 2d 195, it was held that the advice of an informer and an alleged odor of opium in the crack of a door in a dwelling was insufficient to justify search of the premises and arrest of the inhabitants. The court stated the principle of law involved in the following language:

“Without a warrant, seizure upon the search of a home can only be justified if it was an incident to a contemporaneous arrest there.”

United States v. Lee, 83 Fed. 2d 195, 196.

The case at bar is practically on all fours with *United States v. Asendio*, 171 F. 2d 122. In the *Asendio* case, a federal narcotic agent saw a public entertainer, who was a former drug addict, hand a small package wrapped in white paper to the defendant, her road manager, on a street corner. The said agent, together with other federal agents, followed the entertainer and her agent to a hotel. The said agents then secured the help of the city police and agents and the police then went to the hotel room of the defendant. The door was open and the federal agents even asked the defendant if they could search the room and the defendant said “go ahead.” Under the bed, the defendants found the package which was passed to the

defendant by the entertainer on the street corner and this package contained heroin. At the trial, the defendant was convicted by the court without a jury of a violation of Section 174 of Title 21 of the United States Code. The defendant made no motion to suppress the evidence or object to its admissibility. The defendant raised the point of the illegal search and seizure at the time of sentencing of the defendant by the trial judge.

In the *Asendio* case, the Court of Appeals held that the search without a warrant was illegal and in violation of the 4th Amendment and that the federal officers had plenty of time in which to secure a search warrant. With equal force it may be said in the case at bar that the federal officers had plenty of time in which to secure a search warrant before searching Mrs. Frazier's apartment where the narcotics were found.

It is to be noted that in the case at bar, appellant's counsel did not move to suppress the evidence obtained by the illegal search, nor did the appellant's counsel object to the introduction of the seized articles into evidence. In the *Asendio* case, the Court of Appeals held that defendant's failure to move to suppress the evidence or to object to its introduction was not a waiver of the defense. In so holding, the Court of Appeals referred to two other cases from the Third Circuit where reversals were made without appropriate objection below. In *United States v. Ward*, 168 F. 2d 226, defendant's conviction was reversed because the trial judge inferred to the jury that failure of an accused to testify could be considered together with the testimony as to guilt. Defendant's conviction was reversed even though defendant didn't assign this error as a basis for appeal. And in *United*

States v. Pincourt, 167 F. 2d 831, defendant's conviction was reversed upon a ground discovered after an appeal had been taken.

So, in the case at bar, appellant is entitled to a reversal of his conviction because of evidence obtained by illegal search and seizure even though the point of illegal search and seizure was not raised by appellant's counsel below. Appellant, in the case at bar, is entitled to the benefit of the principle enunciated in *United States v. Asendio*, 171 F. 2d 122, at page 125, where the court said:

" . . . We should find it difficult to support the position that a basic constitutional right of the defendant can be denied because his counsel failed to object before or at the introduction of the colorable evidence."

There is another point which cannot be overlooked. If appellant had supplied Burse with the narcotics sold to agent Richards appellant's finger prints would have been on the package. The government produced no finger print testimony although the evidence established that the government had the envelope, which is Government's Exhibit "2", processed for possible finger prints. [Rep. Tr. p. 14.]

Conclusion.

The evidence favorable to the government establishes at best a suspicion of appellant's guilt of the two violations charged in Counts Three and Four. If the trial court had believed appellant's testimony and that of defendant Burse, appellant's conviction obviously could not have resulted. But even if the trial court had disbelieved the testimony of appellant and of defendant Burse, this dis-

belief cannot be considered affirmative evidence pointing to appellant's guilt.

It is clear that all of the evidence relating to Count Four and some relating to Count Three of the Indictment was obtained through an illegal search and seizure in violation of the 4th Amendment. Without such evidence there is *no* evidence at all against appellant as to Count Four and no evidence other than pure suspicion against appellant as to Count Three.

For the reasons stated, therefore, appellant urges a reversal of the judgment of conviction.

Respectfully submitted,

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No. 14687

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SHELLY FISHER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLEE.

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No. 14687

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SHELLY FISHER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLEE.

I.

STATEMENT OF JURISDICTION.

Appellant was indicted by the Federal grand jury in and for the Southern District of California on August 11, 1954 under Section 174 of Title 21, United States Code. Appellant was charged in Count Three of the indictment with co-defendant Shurley Oliver Burse with the unlawful sale of narcotics, and appellant alone was charged in Count Four of the indictment with unlawful concealment of narcotics.

Appellant was arraigned on August 16, 1954, and on August 17 entered pleas of not guilty to both Counts Three and Four. Trial was begun on October 12, 1954 before the Honorable Ernest A. Tolin, United States District Judge, sitting without a jury (appellant was tried

alone, co-defendant Burse having entered a guilty plea). Trial was concluded on October 15, 1954 and the appellant was found guilty as charged in both Counts Three and Four of the indictment. On November 15, 1954, appellant was sentenced to imprisonment for five years on Count Three and five years on Count Four, the sentences to run consecutively, and was fined \$25 on each count. Judgment was entered accordingly and appellant appeals from this judgment.

The District Court had jurisdiction of this cause of action under Section 3231 of Title 18, United States Code, and Section 174 of Title 21, United States Code. This Court has jurisdiction under Section 1291, Title 28, United States Code.

II.

STATUTE INVOLVED.

Section 174, Title 21 of the United States Code, provides in pertinent part as follows:

"Section 174. Importation of narcotic drugs prohibited; penalty; evidence.

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in; knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than \$2,000 and imprisoned not less than two or more than five years.

* * * * *

“Whenever on trial for a violation of this subdivision the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury. As amended November 2, 1951, Chap. 666, Secs. 1, 5(1), 65 Statutes 767.”

III.

STATEMENT OF THE CASE.

The indictment returned on August 11, 1954, was in four counts—appellant being charged only in Counts Three and Four.

Count Three of the indictment charges that appellant and Shurley Oliver Burse did, after importation, knowingly and unlawfully sell to Malcolm P. Richards 92 grains of heroin knowing the heroin to have been imported contrary to law in violation of Section 174, Title 21, United States Code.

Count Four of the indictment charges that appellant Shelly Fisher did, after importation, knowingly conceal 450 grains of heroin which heroin had been imported into the United States contrary to law in violation of Section 174, Title 21, United States Code.

Appellant was arraigned on August 16, 1954 before the Honorable Peirson M. Hall, United States District Judge, and on August 17 pleaded not guilty to both Counts Three and Four. On October 12, 1954, trial was begun in the United States District Court before the Honorable Ernest A. Tolin, without a jury, appellant being there represented by his attorneys Martha Malone Jefferson and Harrison M. Dunham (appellant

was tried alone, the case against co-defendant Shurley Burse having been disposed of without trial). Trial was concluded on October 15, 1954 and appellant found guilty by Judge Tolin on both Counts Three and Four of the indictment.

On November 15, 1954, appellant was sentenced by Judge Tolin to imprisonment for five years on Count Three and five years on Count Four, the sentences to run consecutively and appellant was fined \$25 on each count.

Appellant assigns as error the judgment of conviction on the following grounds.

I. The evidence is insufficient to sustain the judgment of conviction on either Count Three or Count Four and the trial court erred in not granting appellant's Motion for Acquittal.

II. The evidence against appellant on Counts Three and Four was obtained through illegal search and seizure.

IV.

STATEMENT OF THE FACTS.

About 8:00 a.m. on July 22, 1954, Federal Narcotics Agent Malcolm Richards and two deputy sheriffs of Los Angeles County recorded the serial number of \$175.00 [Tr. pp. 12-13] of currency. The Federal Narcotics Agent, under the observation of the deputy sheriffs, then proceeded to the home of co-defendant Shurley Burse, arriving there about 8:30 a.m. [Tr. p. 10]. The Agent had a conversation with Burse and Burse made a telephone call [Tr. p. 11]. After an intervening call the telephone again rang, about 9:30 a.m., and on this occasion Burse addressed someone by the name of "Shel-

ly" [Tr. p. 11]. After that telephone call the Agent again talked with Burse and paid him \$155.00 in the currency whose serial numbers had earlier been recorded [Tr. pp. 11-12]. The list of serial numbers is Exhibit 1.

Thereafter, Burse and the Agent left Burse's home and went to 35th Place and Denker Avenue in Los Angeles where Burse left the automobile in which they were riding and was gone for 15 or 20 minutes. When Burse returned he handed Richards a brown paper with an envelope in it which contained narcotics [Tr. p. 13]. The narcotics were admitted into evidence as Exhibit 2, the envelope containing the narcotics was admitted as Exhibit 2a and the piece of paper in which the envelope was wrapped was admitted into evidence as Exhibit 2b and 2c [Tr. p. 204]. A few minutes later Burse was placed under arrest and he and Richards proceeded to the home of a deputy sheriff where they were joined by other officers. Burse was searched and found to have only \$25.00 of the money given him earlier that morning [Tr. pp. 15, 63-64]. Burse talked to the officers at this point and the officers and Burse then proceeded to an address on Rimpau Boulevard where Burse pointed out a 1940 Packard automobile [Tr. p. 16].

Thereafter, Burse was taken to the corner of Normandie and Adams Boulevard where in the presence of the officers he made a telephone call. He spoke to some individual and asked to have Shelly call him back at that number [Tr. p. 49]. Two or three minutes later the telephone rang. Burse answered it and said, "Shelly, I have this same guy here that picked up from me this morning. He wants two more spoons of stuff" [Tr. p. 23]. Burse then said, "Meet you over at 36th Street

and 9th Avenue" and then handed the telephone receiver to Agent Richards who heard a man's voice say, "36th Street and 9th Avenue in a few minutes" [Tr. p. 23].

Meanwhile, other officers had remained at the Rimpau Boulevard address and at about 1:00 p.m. (the approximate time of Burse's telephone conversation just recited) appellant was observed to leave the address on Rimpau Boulevard, enter the Packard automobile earlier pointed out by Burse and drive away [Tr. pp. 65-66]. The officers followed appellant who drove to the area of Montclair and Chico Streets in Los Angeles. He left his car for about five minutes [Tr. pp. 79-80]. Here appellant was observed to go to an apartment house on Montclair Street and proceed to a landing where there were two apartments. Here appellant was lost from view for about five minutes [Tr. pp. 148-152]. A key to one of the apartments on that landing was later found on the person of appellant, and the apartment contained narcotics [Exs. 5 and 6, Tr. pp. 67-68, 107-109]. Appellant then left the apartment house and drove to 36th Street and 9th Avenue where Burse and Agent Richards were waiting [Tr. pp. 21, 95]. Burse entered appellant's car and appellant drove away at about 50 miles an hour [Tr. p. 96]. Officers overtook appellant's car and placed him under arrest [Tr. p. 96]. They found on his person \$120.00 of the money given Burse that morning by Richards in payment for the narcotics [Tr. p. 97]. The money is marked Government's Exhibit 4. In addition to the money, a key to the Montclair apartment was found on

appellant's person [Ex. 5] which appellant stated was the key to a pool hall on Avalon Boulevard [Tr. pp. 68, 107]. The officers with Burse and appellant, then went to the apartment house on Montclair Street. They proceeded to the landing where appellant had been seen and the key fit the apartment whose address was 3809 $\frac{3}{4}$ Montclair Street. At the apartment appellant stated he did not know what the key was for and that he did not know whose apartment it was [Tr. pp. 107-108]. In fact the key had been given by the occupant of the apartment to appellant's wife, in his presence, so that appellant might paint and paper the apartment [Tr. pp. 175-176]. The apartment was searched and heroin [Ex. 6] and other paraphernalia [Ex. 7] were found there [Tr. pp. 70-73, 109-110]. In addition, a portion of a large brown paper sack [Ex. 8] was found at the apartment [Tr. p. 109] from which had been torn the piece of paper in which Burse delivered the narcotics to Agent Richards earlier that day [Exs. 2b and 2c].

Burse testified on behalf of appellant and testified that he first met appellant in 1947, but did not see him thereafter until May, 1954 when he met appellant at the unemployment insurance office [Tr. p. 215]. Burse testified that he borrowed \$155 from appellant [Tr. p. 217] and agreed to do some work for him [Tr. pp. 217-218]. Burse stated that he sold the narcotics to Richards [Ex. 2] on the morning of July 22, 1954, and met appellant in the same area and repaid him \$125.00 of the borrowed money [Tr. pp. 221-225]. Burse further testified that he

put the narcotics in the Montclair apartment [Tr. pp. 228-229]. Appellant testified that he first met Burse in 1947 and saw him again at the employment office in May, 1954.

“Well, Mr. Burse said he had been drawing his compensation. He said that was his last check and he wanted to find a job, and he wanted to know if I knew of a place he could find a job” [Tr. p. 277].

and at page 279,

“* * * So I knew he was a pretty good worker and he didn't have anything and I could rely on him to work, so I advanced him a sum.”

Appellant testified that he loaned Burse \$155.00. Appellant testified that on the morning of July 22, 1954, he met Burse at 35th and Denker Streets in Los Angeles and Burse paid him \$125.00 of the borrowed money [Tr. pp. 282-283]. Appellant further testified that he then went to work at the address on Rimpau Boulevard. He testified that he left there about 1:00 p.m. and stopped by the apartment on Montclair to pick up Burse, but when he found that Burse was not there proceeded to 9th Avenue and 36th Street to meet Burse [Tr. p. 284]. Appellant denied that he put any narcotics in the apartment on Montclair Street or that he ever gave Shurley Burse any narcotics [Tr. p. 285].

V.

ARGUMENT.

Point One.

The Evidence Is Sufficient to Sustain the Judgment of Conviction on Both Counts Three and Four.

The Government's case against appellant is admittedly circumstantial—but that does not imply weakness. The evidence was sufficient to convince the District Judge of appellant's guilt beyond a reasonable doubt and there is an abundance of evidence to support the District Court's judgment.

At about 9:30 a.m., on July 22, 1954, Agent Richards was at the home of co-defendant Shurley Burse. Burse had earlier made a telephone call in Richard's presence [Tr. p. 11] and at 9:30 the telephone rang and Burse had another telephone conversation, this time using the name "Shelly" [Tr. p. 11]. After that conversation, Richards paid Burse \$155.00 in currency, the serial numbers of which had been recorded by agents of the Federal Bureau of Narcotics and by Deputy Sheriffs of Los Angeles County [Tr. pp. 12-13]. From the time Agent Richards gave Burse the \$155.00 until the time Burse was searched after his arrest, Burse was constantly in the presence of Agent Richards except for *one short period of time*—when Burse left Richards for 15 or 20 minutes and acquired the package of narcotics [Ex. 2]. When Burse was searched a short while later he had only \$25 of the money given him by Richards. The only time Burse had the opportunity to spend the money was

in that 15 or 20-minute period. The only reasonable inference that can be drawn is that Burse paid for the narcotics with the money received from Richards.

And where was that money found? It was found on the appellant Shelly Fisher that same afternoon [Tr. p. 97]. The only reasonable interpretation of these facts is that Shelly Fisher delivered the narcotics to Burse.

Under the circumstances that evidence alone is sufficient to support the judgment of the District Court on Count Three of the indictment.

But there is much more. After Burse was placed under arrest and some other matters had intervened, Burse made a telephone call.

“He talked to some individual and stated that—to have Shelly call back at that number . . .” [Tr. p. 49].

Thereafter the telephone rang and Agent Richards testified as follows [Tr. p. 23]:

“He said, ‘Shelly, I have the same guy here that picked up from me this morning. He wants two more spoons of stuff.’

“Then there was a pause, and then he said, ‘Meet you over at 36th Street and 9th Avenue,’ and just then he handed the receiver to me and I overheard a man’s voice say, ‘36th and 9th Avenue in a few minutes.’”

This conversation took place at approximately one o’clock on July 22, 1954 [Tr. p. 51]. In the meantime, officers were stationed at the address on Rimpau Street and at about one o’clock they observed appellant Shelly Fisher leave that address. (The time of Fisher’s de-

parture is fixed by the testimony of Agent Richards at page 39 where he stated that the officers arrived at Rimpau at about 12:30 p.m. and the testimony of Sergeant Cook who testified that Shelly Fisher left that address approximately one-half hour later [Tr. p. 65]. From there appellant was observed to proceed to the apartment house on Montclair and then go directly to 36th Street and 9th Avenue—the place agreed upon in the telephone conversation with Burse [Tr. p. 95]. At that location Burse entered appellant's car and the car sped away at about 50 miles per hour [Tr. p. 96]. The evidence just recited is abundant to establish the guilt of appellant on Count Three of the indictment, even excluding for the moment the fact that narcotics were later found at the Montclair apartment where appellant stopped enroute to 36th Street and 9th Avenue.

Count Four of the indictment relates to the narcotics found in the apartment on Montclair. There is clearly sufficient circumstantial evidence proving that the appellant Shelly Fisher concealed the drugs at that location. As heretofore noted, appellant was shown to have delivered drugs to Burse on the morning of July 22, 1954. After receiving the telephone call from Burse about 1:00 p.m. on July 22nd asking for more narcotics, appellant went directly to the apartment where the narcotics were stored and then proceeded to meet Burse. At the time of his arrest the officer searched appellant and in addition to the \$120.00 that was found on his person, the officers found a key to the apartment on Montclair [Tr. p. 67]. In the kitchen of the apartment near where the narcotics were found the officers found a piece of a brown paper sack [Ex. 8, p. 115]. It was a piece of paper from that sack [Exs. 2b and 2c, pp. 183-184], which contained

the narcotics [Ex. 2] delivered by Burse to Agent Richards on the morning of July 22nd. Exhibits 2b and 2c fit together with Exhibit 8 like pieces to a jig-saw puzzle [Tr. p. 213].

The key to the Montclair apartment had been given appellant's wife in his presence by the occupant of the apartment, Mrs. Frazier, at the time Mrs. Frazier made a business arrangement with appellant to paint and paper the apartment [Tr. pp. 175-176]. Thus, appellant is shown to have been trafficking in narcotics. His supply had to be stored someplace. He was found with a key to an apartment containing narcotics. A sale he is shown to have made was connected to those narcotics by a paper sack. When he received an order for narcotics, appellant went to the apartment where they were stored. Clearly, the narcotics in that apartment were his.

The explanation offered by appellant Shelly Fisher was disbelieved by the District Court. Burse testified that he met appellant in 1947 but didn't see him thereafter for seven years. Then he met appellant at the unemployment insurance office. Burse testified, "I had drawn all my insurance and couldn't find a job . . ." [Tr. p. 216]. Fisher explained [Tr. p. 279], ". . . I knew he was a pretty good worker and he didn't have anything and I could rely on him to work, so I advanced him a sum." The total amount Fisher is alleged to have loaned was \$155.00. This much of the story in itself is incredible—that a person in moderate circumstances would loan \$155.00 to a virtual stranger who had just drawn his last unemployment check.

All of the testimony by Shurley Burse was unworthy of belief. At pages 237 and 238 of the transcript Burse

testified that he worked for two days painting in the Montclair apartment and then corrected his statement to say that he did cleaning-up work for three or four days. But Mrs. Frazier stated [Tr. pp. 196-197] that the only work done at all on her apartment was one afternoon when Shelly Fisher assisted her. Burse testified [Tr. pp. 240-241] that the narcotics he delivered to Richards on the morning of July 22nd he had taken from his own home—but the wrapper they came in was from a paper sack found in the Montclair apartment. Burse testified [Tr. pp. 272-273] that he took the key from under the mat at the Montclair apartment and kept it and ultimately lost it. Yet it was there on the afternoon of July 22, 1954, when the neighbor came to use the phone [Tr. pp. 198-199]. Burse's testimony was completely impeached and discredited by showing that at the time of his arrest he gave a different version of the facts concerning the sale of narcotics—and one, incidentally, which coincides with the evidence introduced by the Government [Tr. pp. 265-266 and 314-315].

Appellant gave false answers to the arresting officers concerning the key, and denied that he even knew who lived in the Montclair apartment [Tr. pp. 68-70]. The testimony of appellant was impeached by showing a prior conviction for the same offense [Tr. p. 299].

Appellant argues in his brief (p. 7) that in order to convict a defendant on circumstantial evidence, "The proved circumstances must not only be consistent with the hypothesis that the defendant is guilty of the crime, but the proved circumstances must be irreconcilable with any other rational conclusion." The answer to this suggestion is two-fold. Firstly, the evidence introduced at the trial presented no rational hypothesis of innocence.

The story told by appellant and his co-defendant Burse does not reasonably and logically account for the circumstances proving appellant's guilt. Secondly, the proposition cited by appellant is not the law. In *Penosi v. United States* (9th Cir., 1953), 206 F. 2d 529, this Court commented in discussing the rule proposed by appellant, at page 530:

"This is the language sometimes used in instructions to juries which, in many cases, serves no other purpose than to confuse. . . . If the evidence is sufficient to convince beyond a reasonable doubt that the charge is true it is immaterial whether it be circumstantial or direct."

The Supreme Court of the United States has similarly rejected this type of jury instruction. In *Holland v. United States*, 348 U. S. 121, at pages 139-140, the Court stated:

"There is some support for this type of instruction in the lower court decisions, . . . (citations) . . . but the better rule is that where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect. (Citations.)"

It should be added that the argument here advanced by appellant is certainly unwarranted in a trial without a jury which is the situation in the instant case.

That the Government's evidence is sufficient to sustain the judgment cannot be questioned. Compare *Stoppelli v. United States*, 183 F. 2d 391 (cert. den. 340 U. S. 65) where appellant and four others were tried in Oakland, California, under this section. The evidence introduced against Stoppelli was that the narcotics had

come from New York and that Stoppelli was from New York; a fingerprint from the ring finger of Stoppelli's left hand found on one of twelve envelopes which contained narcotics; and a fingerprint expert's testimony that the print was made at a time when the envelope contained a powdery substance and was not more than four weeks old. This court ruled that the evidence was sufficient to uphold the conviction. And in *Penosi v. United States*, *supra*, this Court ruled the evidence sufficient to uphold the defendant's conviction where the evidence connecting him with the offense consisted of a telegram, an airplane journey, and some wrapping paper found in a hotel room which was not his but in which he was sleeping.

In *Woodard Laboratories v. United States* (9th Cir., 1952), 198 F. 2d 995, at page 998, this Court observed:

"The usual rule to be followed in determining the sufficiency of evidence to sustain a judgment is well settled. 'It is not for us to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the government, to support it.' (Citations.) . . . The fact that some of the evidence admitted is consistent with innocence is not determinative of the sufficiency of the evidence. . . . Substantial evidence is ' . . . such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. . . .' (Citation.)"

There is clearly sufficient evidence to support the conclusion that appellant delivered the narcotics to Burse on the morning of July 22, 1954 and appellant concealed the narcotics found in the Montclair apartment.

Point Two.

Appellant Has No Standing to Complain of the Alleged Illegal Search and Seizure.

A. Appellant Raised No Objection to the Evidence in the District Court.

It should be noted first of all that there is no evidence in the record that the search of the apartment was conducted without a search warrant. The Government is not here stating that the search was in fact conducted with a warrant but is rather calling attention to the fact that the *record* does not support the statements contained in appellant's brief.

As noted in appellant's brief at page 12 he made no motion to suppress the evidence obtained by the search of the Montclair apartment nor did he object to the introduction into evidence of any of the articles found there. Appellee submits that the question cannot be raised for the first time on appeal.

This Court has ruled squarely on the issue presented herein. A similar situation existed in the case of *Stein v. United States* (9th Cir., 1948), 166 F. 2d 851, cert. den. 334 U. S. 844. This Court stated at page 855:

"This argument is concerned with the admissibility of the opium in evidence in that it was not seized pursuant to a lawful arrest. The issue as argued here was not raised at the trial. No motion to suppress was made and, furthermore, appellants made no objection to the introduction of the opium into evidence. *It is too late to raise the question for the first time on appeal.*" (Emphasis added.)

The United States Court of Appeals for the District of Columbia has gone even further. In *Cromer v. United*

States (1944), 142 F. 2d 697, the defendant objected at the trial to the introduction of some narcotics on the ground that they had been obtained by an illegal search and seizure. The Court overruled the objection and admitted the evidence. On appeal the defendant again urged that the drugs had been obtained by an illegal search and seizure. The Court stated at page 699:

“We need not decide this question because the appellant did not move before the trial for the suppression of this evidence or explain his failure to do so.”

The case cited by appellant in his brief (p. 11), *United States v. Asendio* (3rd Cir., 1948), 171 F. 2d 122, does not support the proposition that the question can be raised for the first time on appeal. In that case there was no motion to suppress the evidence prior to trial and no objection to the admissibility of the evidence at the trial. But the question was raised in the District Court and urged upon the Court before sentence. In the *Asendio* case the Court of Appeals expressly declined to hold that the defense would be available if raised for the first time on appeal and commented (pp. 124-125):

“ . . . Defendant did bring the matter to the attention of the District Judge who was the trier of the facts, . . . and . . . the Court below did have opportunity to consider and dispose of the issue.”

In the instant case the question was never raised in the District Court but was raised for the first time in the Court of Appeals with the filing of appellant's opening brief.

United States v. Ward (3rd Cir., 1948), 168 F. 2d 226, and *United States v. Pincourt* (3rd Cir., 1948), 167

F. 2d 831, simply involve instances of "plain error" within the meaning of Rule 52(b) Federal Rules of Criminal Procedure. In the *Ward* case the trial judge inferentially commented on the failure of an accused to testify. In the *Pincourt* case the entire trial was conducted on the theory that a Government regulation included the prohibition of the *delivery* of certain products. The prosecution was based on that theory, the case was defended on that theory and the jury instructed on that theory. In fact, as discovered for the first time in the Court of Appeals, the Government regulation prohibited *sales only* and did not include deliveries.

"But where the error is plain and transcends the legal power of the court which made it we may notice it."

Karrell v. United States (9th Cir., 1950), 181 F. 2d 981, 986.

There is no question of "plain error" in the instant case. No "error" by the trial court can be pointed out. There is *no* authority which has permitted the issue of an illegal search and seizure to be raised for the first time on appeal.

B. The Right to Complain Because of an Illegal Search and Seizure Is a Privilege Personal to the Injured Class and Appellant Does Not Fall Within That Class.

The principle just cited is so well settled that the *Cyclopedia of Federal Procedure*, Section 40.79 (Vol. II, p. 160) after citing cases in support of this principle, observes (note 20):

"Many other decisions so hold that it is deemed a waste of space to cite them, there being no decisions to the contrary."

The Supreme Court has made the same observation in *Goldstein v. United States* (1942), 316 U. S. 114, at 121:

“ . . . The federal courts in numerous cases, and with unanimity, have denied standing to one not the victim of an unconstitutional search and seizure to object to the introduction in evidence of that which was seized.”

The “victim” or “injured party” is limited to one who asserts an interest in the premises searched or the property seized.

Curry v. United States (5th Cir., 1951), 192 F. 2d 571;

Ingram v. United States (9th Cir., 1940), 113 F. 2d 966.

In the *Ingram* case this Court stated at page 967:

“If the search and seizure constituted an invasion of the constitutional rights of Joseph Woods, it did not therefore invade the constitutional rights of appellant, the privacy of whose home or place of abode was not violated, nor can he be heard to complain that the rights of his co-defendant had been invaded, nor can he invoke the benefits of the Fourth and Fifth Amendments in behalf of his co-defendant. . . .”

“ . . . The right to complain because of an illegal search and seizure is a privilege personal to the wronged or injured party, and is not available to anyone else. . . . Where the defendant disclaimed ownership of the property seized, he could not complain of the illegality of the search.”

The burden is upon one who seeks to suppress evidence to affirmatively assert an interest in the premises searched

or the property seized. In *Gorland v. United States* (App. D. C. 1952), 197 F. 2d 685, 686, the Court observed:

“ . . . the motion to quash the search warrant did not meet the requirements of Rule 41(e) of the Federal Rules of Criminal Procedure, 18 U. S. C. A. Appellant made no claim to ownership or possession of the property seized by police, or to an interest in the premises searched, and has no standing here to contest the seizure.”

In the instant case, appellant testified that he had been employed “to paint the interior and hang some paper” [Tr. p. 280] at the Montclair Apartment. When asked if he had visited that apartment, appellant replied only, “Oh, I went there with my wife. I don’t remember just when.” And when asked if he visited there often, he replied, “Not too numerous, but I have been there” [Tr. p. 298]. Concerning the narcotics found in the Montclair Apartment appellant testified [Tr. p. 290], “He asked me was it mine, and I told him no.” Thus, appellant disclaims any interest in the premises searched or the property seized. His entry in the apartment without the owner’s consent for any purpose other than papering or painting would constitute him a trespasser. His interest as a worker or employee of the owner is insufficient.

“Workmen without interest in the premises or in the property seized and not dwelling thereon cannot raise the constitutional question. . . .”

United States v. Muscarelle, et al. (2d Cir., 1933), 63 F. 2d 806, cert. den. 290 U. S. 642.

Appellant urges that the case of *United States v. Jeffers* (1951), 342 U. S. 48, supports his contention that he is in a position to complain of the search and

seizure in the instant case. But the *Jeffers* case does not go so far. In that case, police officers in Washington, D. C., searched a hotel room belonging to two aunts of the defendant. The Court stated (p. 50):

"It appeared from the evidence at the pretrial hearing that the Misses Jeffries had given respondent a key to their room, that he had their permission to use the room at will, and that he often entered the room for various purposes."

Police officers found narcotics in the room and

". . . Respondent was arrested the following day on the charges before us, *at which time he claimed ownership of the narcotics seized.*" (Emphasis added.)

The Supreme Court does appear to hold in that case that an interest in the property seized is sufficient to give a defendant standing to object to a seizure even though the individual complaining had no interest in the premises searched. The decision in the *Jeffers* case ultimately hinged on his claiming a property interest in the narcotics. The Court said (p. 52):

"The respondent unquestionably had standing to object to the seizure made without warrant or arrest unless the contraband nature of the narcotics seized precluded his assertion . . . of a *property interest* therein." (Emphasis added.)

Thus, the Supreme Court merely restated the rule that a person has standing to complain of a search or seizure when he possesses an interest in the premises searched *or* the property seized.

Subsequent to the *Jeffers* case, in *Irvine v. California* (1953), 347 U. S. 128, the Supreme Court observed at page 136:

“ . . . and the lower federal courts, treating the Fourth Amendment right as personal to one asserting it, have held that he who objects *must claim some proprietary or possessory interest in that which was unlawfully searched or seized.*” (Emphasis added.)

And in *Scoggins v. United States* (App. D. C. 1953), 202 F. 2d 211:

“ . . . Appellant is without standing to challenge the evidence. . . . Appellant's standing to challenge must rest upon a claim either of possession of the contraband or its seizure from his premises.” (Citing the *Jeffers* case.)

See also *Washington v. United States* (App. D. C. 1953), 202 F. 2d 214; *Henderson v. United States* (5th Cir., 1953), 206 F. 2d 300.

An anomalous situation exists with respect to the law on the standing of a person to complain of a search and seizure. For example, appellant's conviction on Count Four rests upon the Government's proof that the narcotics in the Montclair apartment were his—yet the law denies him the right to complain of the search and seizure because he disclaims any interest in the narcotics. But the courts recognize the anomaly and there is no question but that it is existing law. Judge Learned Hand discussed this problem in the case of *Connolly v. Medalie*

(2nd Cir., 1932), 58 F. 2d 629: There Judge Hand said at page 630:

"We assume for argument that the search and seizure were unlawful; and that any persons aggrieved might suppress the evidence so acquired. None of the petitioners fall within that class . . . The power to suppress the use of evidence unlawfully obtained is a corollary of the power to regain it. The prosecution is forbidden to profit by a wrong whose remedies are inadequate for the injury, unless they include protection against any use of the property seized as a means of conviction. The relief being thus remedial, the evidence has never been thought incompetent against any one but the victim. Conceivably it might have been; it might have been held that the prosecution, though not disqualified from taking advantage of another's wrong . . . should not profit in any wise by its own. But that would obviously introduce other than remedial considerations; the doctrine would then be like that of equity which denies its remedies to one who is not himself scathless. . . . Men may wince at admitting that they were the owners, or in possession, of contraband property; may wish at once to secure the remedies of a possessor, and avoid the perils of the part; but equivocation will not serve. If they come as victims, they must take on that role, with enough detail to cast them without question. The petitioners at bar shrank from that predicament; but they were obliged to choose one horn of the dilemma."

To the same effect see *Grainger, et al. v. United States* (4th Cir., 1946), 158 F. 2d 236.

Conclusion.

There is substantial evidence to support the District Court's judgment on both Counts Three and Four. Appellant cannot complain of the alleged illegal search and seizure, firstly because he failed to raise the question in the District Court, and secondly because the right to complain is personal and may not be availed of by one who denies ownership or possession.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

LOUIS LEE ABBOTT,
*Assistant United States Attorney,
Chief, Criminal Division,*

CECIL HICKS, JR.,
*Assistant United States Attorney,
Attorneys for Appellee.*

No. 14688

**United States
Court of Appeals**
for the Ninth Circuit

NELSON EQUIPMENT COMPANY, a Corporation,

Appellant,

vs.

UNITED STATES RUBBER COMPANY, a Corporation,

Appellee.

Transcript of Record

**Appeal from the United States District Court
for the District of Oregon**

FILED

APR 18 1955



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For appellant:

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JOHN C. VEATCH,
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Portland, Oregon.

For appellee:

ROSENBERG, SWIRE & COAN;
MARVIN SWIRE,
710 Pittock Block,
Portland, Oregon.

In the United States District Court
for the District of Oregon

No. Civil 7177

UNITED STATES RUBBER COMPANY, a Corporation,

Plaintiff,

vs.

NELSON EQUIPMENT COMPANY, a Corporation,

Defendant.

COMPLAINT

Plaintiff alleges:

I.

That plaintiff is a corporation incorporated under the laws of the State of New Jersey and defendant is a corporation organized under the laws of the State of Oregon. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

II.

Defendant owes plaintiff \$3,387.96 with interest thereon at the rate of 6% per annum from February 17, 1953, until paid, for merchandise sold and delivered by plaintiff to defendant between December 9, 1952, and February 17, 1953.

Wherefore, plaintiff prays for a judgment against the defendant for the sum of \$3,387.96 with interest

at the rate of 6% per annum from February 17, 1953, until paid, and for plaintiff's costs.

ROSENBERG, SWIRE & COAN,

By /s/ MARVIN SWIRE,

Of Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed September 11, 1953.

[Title of District Court and Cause.]

ANSWER

Defendant admits the allegations stated in paragraphs 1 and 2 of the complaint to the extent set forth in the counterclaim herein.

For counterclaim against plaintiff, defendant alleges:

1. That defendant is a corporation organized under the laws of the State of Oregon, and plaintiff is a corporation organized under the laws of the State of New Jersey. The amount in controversy in this counterclaim exceeds the sum of \$3,000.00, exclusive of interest and costs.

2. On the 5th day of February, 1952, defendant was the authorized distributor for fire hose manufactured and sold by plaintiff in the states of Oregon, Washington and Idaho and the Territory of Alaska and on said day sold to the City of Seattle, Washington, 4,800 feet of fire hose to be delivered

by plaintiff to the fire department of said city and thereafter on the 17th day of April, 1952, defendant paid plaintiff the sum of \$5,618.88 on account of said hose.

3. Plaintiff delivered said hose to said fire department in a damaged and defective condition and unsuitable for use for any purpose whatsoever and said fire department refused to accept the same.

4. Defendant returned said hose to plaintiff and plaintiff refused and still refuses to replace the same or to refund to defendant said sum paid by defendant to plaintiff.

Wherefore, defendant prays for judgment against plaintiff for the sum of \$5,618.88 with interest at the rate of 6% per annum from the 17th day of April, 1952, less the sum of \$3,387.96 with interest at the rate of 6% per annum from the 17th day of February, 1953, and for defendant's costs herein.

VEATCH, BRADSHAW &
VEATCH,

/s/ JOHN C. VEATCH,

Attorneys for Defendant.

Service of copy acknowledged.

[Endorsed]: Filed October 1, 1953.

[Title of District Court and Cause.]

REPLY

Plaintiff, for reply to defendant's counterclaim, makes the following defenses:

First Defense

Defendant's counter-claim fails to state a claim upon which relief can be granted.

Second Defense

Plaintiff admits the allegations of Paragraph I and that it delivered to the Fire Department of Seattle, Washington, 4,800 feet of fire hose for which it received payment from defendant in the sum of \$5,618.88, and that said hose was subsequently returned to plaintiff, and that plaintiff refused and refuses to replace same with other hose or to refund said sum. Except as herein expressly admitted, plaintiff denies generally and specifically each and every allegation contained in defendant's counter-claim and the whole thereof, and plaintiff alleges that it is presently holding said hose for defendant and subject to defendant's orders and instructions.

Third Defense

Defendant's order for said hose specified that it be inspected by United Laboratories, Inc., a corporation engaged in the business of inspecting and determining the quality of merchandise, and that defendant agreed that the determination of whether

said hose was of the quality called for by said order be made by said United Laboratories, Inc. That said corporation inspected said hose in accordance therewith and found the same of good and proper quality and applied its label thereto in evidence thereof, and that said hose in the condition as when so inspected was then delivered to the City of Seattle, Washington, in accordance with defendant's order.

Wherefore, plaintiff prays for judgment as demanded in its complaint.

ROSENBERG, SWIRE & COAN,

By /s/ MARVIN SWIRE,

Of Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed October 20, 1953.

[Title of District court and Cause.]

AGREED STATEMENT

Plaintiff, United States Rubber Company, is a New Jersey corporation, manufacturing and selling fire hose through a division known as "Eureka Fire Hose" which maintains a sales office in the City of New York, and a factory at Passaic, New Jersey, and is hereinafter referred to as "Eureka." Defendant, Nelson Equipment Company, is an Oregon corporation, with places of business at Portland, Oregon, and Seattle, Washington, and is hereinafter referred to as "Nelson."

In January, 1952, Nelson was Eureka's authorized distributor for fire hose in the states of Oregon, Washington, Idaho and the Territory of Alaska. As such distributor, Nelson would notify Eureka of advertisements for bids for fire hose and ask for bidding instructions. Sometimes Eureka would quote Nelson a bid price and a discount on such price and sometimes would quote an invoice price and allow Nelson to fix the bid price. When bids were accepted and the hose delivered to the customer, Nelson would pay Eureka the invoice price or the bid price less the discount, as the case might be, and bill the customer for the bid price.

In January, 1952, Nelson notified Eureka of a call for bids by the City of Seattle, for two lots of fire hose, one for 2½-inch and one for 3½-inch hose, and asked for bidding instructions. Eureka designated a bid price for the 3½-inch hose and quoted Nelson an invoice price for the 2½-inch and advised Nelson to fix the bid price. The city accepted Nelson's bid for both lots and the hose was subsequently shipped from Eureka's factory to the Seattle Fire Department and, upon receipt of the shipments, Nelson paid Eureka for both lots, the payment for the 2½-inch being the sum of \$5,618.88, and billed the city for the bid price. The city subsequently rejected the 2½-inch hose for alleged defects and refused to pay Nelson the bid price and Nelson demanded of Eureka a replacement of the hose or a refund of the sum it had paid. The matter was under discussion over a period of several

months during which time Nelson became indebted to Eureka in the amount of \$3,387.96 on other items for which Eureka billed Nelson monthly, and Nelson held up payment of these items pending a settlement of the hose claim. In September, 1953, Eureka commenced action against Nelson to collect the sum of \$3,387.96 which indebtedness Nelson admitted but counter-claimed for the sum of \$5,618.88, the amount it had paid Eureka for the rejected hose.

The case come on for trial before Honorable James Alger Fee who had just been appointed Judge of the United States Court of Appeals for the Ninth Circuit, and by stipulation of counsel, with the consent of the court, the testimony was taken without the presence of the court to be submitted to the court upon the pleadings, transcript of testimony, depositions and exhibits. Thereafter Honorable Claude McColloch, Chief Judge of the District Court for the District of Oregon, with consent of counsel, assigned the case to Honorable George H. Boldt, District Judge for the District of Washington, Western Division, then sitting as District Judge for the District of Oregon, for decision, who subsequently filed his decision, finding of fact, conclusions of law and entered judgment in favor of plaintiff and against defendant in the sum of \$3,387.96, with interest thereon at the rate of 6 per cent per annum from the 17th day of February, 1953, and for costs and disbursements, from which judgment this appeal is taken, which decision, findings, conclusions of law and judgment are included as a part of this agreed statement.

Now, therefore, it is agreed that the exhibits, depositions and transcripts of testimony show the following facts essential to a decision on this appeal:

On February 5, 1952, the City of Seattle issued and delivered to Nelson its purchase order for 2½ inch fire hose in words and figures as follows, omitting printed matter:

2/5/52.

Nelson Equipment Co., Distributors,
Eureka Fire Hose,
3700 Airport Way,
Seattle, 4.

Ship to City of Seattle Fire Department,
301 2d Ave. S.

4,800 ft. Eureka 2½ inch double jacket rubber lined fire hose equipped with National Standard threads and Elkhart X—True couplings, each and every section to bear label of Underwriters' Laboratories, Inc.

4,800 ft.	\$5,856.00
2%	117.12
	<hr/>
Total	\$5,738.88
State Tax	172.17
	<hr/>
Total	\$5,911.05

PAUL R. HENDRICKS,
Purchasing Agent.

This order is contingent on your filing a 5% performance bond.

Delivery by May 10, 1952.

This order was forwarded to Jonas R. Smith, Eureka's sales manager, at its office in the City of New York, who inquired whether Eureka or Nelson should furnish the performance bond and, upon being informed that Nelson would furnish the bond, accepted the order.

The hose was manufactured at Eureka's factory at Passaic, New Jersey, in sections of 50 feet each, and each and every section was tested and inspected by representatives of Underwriters' Laboratories and found to be satisfactory with the exception of one section which was rejected and a substitution made, and the Underwriters' labels were attached, and was packed in cartons to prevent chaffing or damage in shipment in accordance with the usual custom.

The hose was shipped from the factory on March 28, 1952, and on that day Eureka billed Nelson for its purchase price. It arrived at Seattle on April 8, 1952, and on April 17, 1952, Nelson paid Eureka the sum of \$5,618.88, that being Eureka's invoice price, and billed the City of Seattle for \$5,911.05, the bid price.

Robert B. Rogers, by deposition, testified that he is Assistant Chief of the Seattle Fire Department; that he has been in the department 44 years and has been assistant chief for the past 15 years; that the hose was received at fire department headquarters

at Station 10 on April 8, 1952, and remained there until approximately April 28, during which time the members of Engine Companies 1 and 10 and Ladder Company 1, under his direction, took the hose and examined it; that each section was laid out at full length on the floor and one man would pick up a section and run it through his hands and examine it for defects and then turn it over and repeat the process; that this is the same inspection made of all new hose; that no defects were found on this inspection. That in accepting bids the only factor considered was the amount, and that the purpose of requiring Underwriters' label on hose is to show that the hose was manufactured according to certain standards so that an analysis of each lot of hose is unnecessary and to insure uniformity in bids, as without this requirement bids would be for various prices without uniformity as to qualify; that the fire department rejects hose bearing the Underwriters' label when defects are found.

That, after this inspection, the hose was stencilled with lot and section numbers, and sections numbered 1 to 48, being 2,400 feet, were delivered to Engine Company 6 on April 29, 1952, and sections numbered 49 to 96 were delivered to Engine Company 18 on April 30, 1952. That on May 10, 1952, he received a call from the Battalion Chief in charge of Station 18 regarding the condition of the hose and he instructed the Chief to lay out some of the worst sections for inspection; that he inspected 16 sections of the hose on May 17, 1952, and found that there were holes through the jackets and the outer jackets were

frayed and in poor condition; that as a result of this inspection, 37 sections were returned to Nelson on May 27, 1952; that he saw the hose a few times after its return and on September 4, 1952, he was accompanied by a representative of the Underwriters' Laboratories and they inspected the 37 sections returned at Nelson's Seattle plant, together with the manager of the plant; that they made various tests to try to determine what was wrong with it, part of which were tests to determine the presence of acid, but were unable to find the cause of the defects; that in his opinion there was a latent defect in the fabric of the jackets which appeared all right but would not stand up; that good fire hose lasts from 10 to 15 years.

That he received no complaint of the 48 sections delivered to Engine Company 6 but, after the examination of the 37 sections at Nelson's plant on September 4, and a conference with a representative of the Purchasing Department and the representative of the Underwriters' Laboratories, they decided to have all the hose examined and on September 23, 1952, he sent Captain Steel of the Fire Department to inspect the lot delivered to Engine Company 6; that after this inspection and after much discussion with members of the Fire Department, the Purchasing Department and the representative of the Underwriters' Laboratories it was decided to reject the entire lot and the remainder of the hose was returned to Nelson's Seattle plant on January 23, 1953; that the reason for the rejection of the hose

was its poor condition; there were holes and frayed spots in the outer jackets; hose can have holes in the outer jackets and still maintain the pressure necessary to fight fires but such holes continue to grow and fray and finally there is a scuff on the inner jacket and then the hose bursts and instead of having a hose that would last from 10 to 15 years it may last but one year; when this hose was returned it was unfit for use as a fire hose.

The entire lot, save the 37 sections rejected and returned in May, was kept in service until January 23, 1953. The decision to reject the entire lot was based upon the inspection of September 23, and the defects in the 37 sections.

Clarence G. Steel, by deposition, testified that he is a former Captain in the Seattle Fire Department, having retired in March, 1953; that he was in charge of Engine Company 7 and on September 23, 1952, at the direction of Assistant Chief Rogers, he inspected 48 sections of the hose at Engine Company 6; that when he arrived part of the hose was laid out on the floor and part was on the fire apparatus; that the hose that was defective was laid aside and that showing no defects was put back on the apparatus and the remainder on the apparatus was then removed and inspected; that the men at the station went over each section and called his attention to any defects found and that he recorded the numbers of the sections and the defects found; that the hose had the appearance of new hose but 22 sections had scuff

marks or breaks in the outer jackets and the coupling on one section looked like it was pulling out; that from this inspection he would say that for brand new hose there was something radically wrong with it; that 25 sections appeared to be all right and these sections were put back on the apparatus but none of the defective sections were put back; that he does not know what was done with the hose after his inspection and report.

Glen Anderson, by deposition, testified that he is a Captain in the Seattle Fire Department, has been with the department 26 years and has been a captain 9 years; that he has been in charge of Engine Company 18 since 1947; that when the 48 sections were delivered to his station it was apparently new hose; that there was considerable water in each length; that one-half of it was drained and put on the fire apparatus and the other half laid out and stenciled with the engine company number; then these sections were put on the apparatus and the other half taken off and stenciled and then hung in the drying tower where it remained until May 6, 1952, when it was taken down and the hose on the apparatus was taken off and hung up to dry and was replaced with the dry hose; that the second half was dry by May 9, 1952, and when taken out of the drying tower a number of breaks and frayed spots were noticed in the outer jackets; that none of the hose had been put in use up to that time as this company had had no fires; that he called his immediate chief and an inspection of all 48 sections was made on May 10,

and 37 sections were found defective and were later picked up by the commissary driver; that the 11 sections remaining were put back in use; that, generally speaking, hose up to five years in service is considered class A hose and there won't be any breaks through the outer jackets; that the damage observed in the 37 sections could not have occurred through the handling of the hose up to that time; that the 11 sections remaining were not picked up until January 23, 1953, and when picked up they had no breaks in the outer jackets and showed only normal wear; that all hose is dried because where water is left in it it will form a mild sulfuric acid but this usually occurs in old hose and does not affect new hose as a rule.

On May 28, 1952, Nelson notified Jonas R. Smith, sales manager of Eureka, of the defects found in the 37 sections of the hose and asked for instructions. On June 3, 1952, Smith advised Nelson to have the City of Seattle submit the complaint to the Underwriters' Laboratories and several sections of the hose were sent to the Laboratories for inspection. On November 7, 1952, Mr. Corbett, President of Nelson, wrote to Smith enclosing a copy of the Underwriters' report dated October 27, 1952, and notifying Smith that the City had rejected all of the hose and asking for instructions, but no reply was received. On November 26, 1952, Corbett wrote Smith asking for a reply to the letter of November 7, but no reply was received. On December 9, 1952, Corbett wired

Smith asking for a reply to the letter of November 7, but received no reply. On December 10, 1952, Smith wrote to Corbett cancelling Nelson's distributors contract but made no mention of the hose. On December 15, 1952, Corbett wrote Smith asking for an answer to the letter of November 7, but received no reply. On January 6, 1953, Corbett wrote Smith reminding him that Smith had promised in a telephone conversation to immediately take care of the hose problem and that nothing had been done and that the hose was held at Seattle awaiting Smith's instructions as to its disposition but received no reply. On January 16, 1953, R. E. Vadnais, manager of Nelson's Seattle plant, wrote to Smith reminding him that no answer had been made to previous correspondence; that the City of Seattle was demanding immediate replacement of all the hose; that Nelson had no alternative but to return the hose to Eureka and that it would be returned collect. No reply was received and the hose was returned by Nelson.

Jonas R. Smith, sales manager of Eureka, by deposition, testified that he had discussed the hose situation with Nelson both by correspondence and telephone; that he had at least four and possibly five telephone conversations with Corbett between approximately July 15, 1952, and January 15, 1953; that he told Corbett that, since the hose had been manufactured according to the Underwriters' specifications and had been thoroughly tested by the Underwriters, the City of Seattle should take the matter up with the Underwriters; that Corbett had

told him that Eureka should replace the hose and he told Corbett that Eureka could not do that until the factory had a chance to examine the hose and see whether it was defective or whether it had been damaged by the customer and that the usual procedure was to ship the hose to the factory, collect, for examination and report; that the hose arrived at Eureka's New York office on March 10, 1953, charges collect; that Eureka had had no notice from Nelson to expect the hose; that he had never agreed to replace the hose for Nelson and had never agreed to accept the hose and issue a credit.

Scott S. Corbett, President of Nelson, testified that he had but one telephone conversation with Smith; that Nelson keeps a record of outgoing telephone calls which shows that this conversation occurred on December 18, 1952; that in the conversation he reviewed his previous letters to Smith and told Smith that Nelson would either have to have a replacement of the hose or a refund of the purchase price by Eureka; that Smith said he would take care of it; that Smith never asked him to return the hose for inspection and never refused to accept the hose when it was returned; that he never knew what happened to the hose after its return until he saw the deposition of Mr. Hellegers in this case; that when the first 37 lengths of hose were returned the City did not cancel the purchase order but simply demanded a replacement of the defective hose; that Nelson was endeavoring to keep the purchase order

open until instructions could be received from Eureka.

That the Underwriters' Laboratories label on hose simply means that it was manufactured according to certain minimum standards; that Nelson sells an average of 120,000 to 150,000 feet of fire hose a year; that about 40 per cent is Underwriters' standard and 60 per cent "grade" hose which is a higher standard than the Underwriters; that two lots of Eureka hose were ordered by the City at the same time and no defects were found except in this lot.

R. E. Vadnais, manager of Nelson's Seattle branch, testified that when the 37 lengths of the hose was returned he requested the fire department to keep the other sections and use them until Nelson could hear from Eureka and learn what he could or could not do but was finally told by the purchasing department of the City that the fire department needed the hose and that the whole lot would have to be replaced and he then returned the hose to Eureka.

Walter Hellegers, Claims Manager of Eureka's factory at Passaic, New Jersey, testified that he has been in Eureka's employ since 1911, and chief inspector at the Passaic plant until 1947; and claims manager since that time; that the Passaic plant manufactured various articles besides fire hose; that his duties consist in examining articles returned by customers for the purpose of determining whether the customer is entitled to credit for defects in manufacture; that he does not come in contact with

Eureka's customers but complaints go to the sales department which refers the matter to the claims department which examines the article to determine whether there were defects in manufacture; that the hose involved in this case is 2½ inch rubber lined fire hose with two cotton outer jackets which are woven on looms inspected twice daily and from yarn pre-tested in Eureka's textile laboratory; that the jackets when finished are inspected and the rubber tube then inserted in the jackets and the completed hose is then subjected to a hydrostatic pressure of 400 pounds per square inch to determine if there are any defects in the hose; that if there are any defects in the jackets, the cotton threads would snap under the pressure. If the hose is sold under the Underwriters' label, it is then turned over to the Underwriters' inspectors who subject it to various tests which include hydrostatic pressure test, a burst test, a kink test, a test pertaining to elongation, a twist test, a warp and rise test, a test as to thickness of lining, an adhesion test of the lining, a physical test of the lining and an accelerated aging test. All of the sections of the hose shipped to Seattle were subjected to these tests and but one section was found defective which was replaced.

That the returned hose arrived at the Passaic plant on February 11, and was inspected between that date and February 16, 1953; that the hose was dirty and the threads in the jackets were abraided and scuffed and in these areas the hose was dirty indicating it had come in contact with foreign ob-

jects; that if the damage had been due to defects in the cotton jackets the breaks would have been clean breaks but instead the damage consisted of tears in individual strands of each yarn indicating that it was only from wear as the result of the hose rubbing against another object; that a report of the examination was made to the sales department on February 16, 1953, and on that day a written request was made to Underwriters' Laboratories, Inc., for an inspection and the sales department notified of such request and, on or about April 10, 1953, a Mr. McNab, a representative of the Underwriters' Laboratories, made an inspection.

That all but 12 or 13 lengths of the hose returned showed damage and when returned it was unsuitable for use as fire hose; that with good care fire hose should last the average City several years; that after the hose was returned no tests were made of the fabric in the jackets; that his only purpose in making the tests was to determine if there were defects in manufacture and whether the claim should be charged to the factory or the sales department; that he held the hose until August, 1953, when he transferred it to Eureka's Bergen warehouse about 12 miles away where it is now located; that his purpose in holding it was awaiting instructions from the sales department as to its disposition; that he had no contact with the customer as that is the business of the sales department; that he did not hold the hose for any purpose of Nelson, but he held it and put it in a warehouse as customers' property.

Raymond W. McNab, by deposition, testified that he is employed by the Underwriters' Laboratories, Inc., and made an inspection of the hose at Eureka's plant on March 13, 1953; that all but 13 of the 96 sections of hose showed damage in the outer jackets; that the hose was dirty and scuffed and each hold in the fabric was surrounded by a dirty ring making it apparent that the damage was caused by external action.

Clarence Hessey, by deposition, testified that he is the inspector for Underwriters' Laboratories, Inc., who inspected the hose before shipment to Seattle; that he inspected 99 sections out of which 96 sections were included in the shipment; that he found 98 sections satisfactory and rejected one section for defects in the cotton jacket.

Statement of Points

The defendant-appellant in presenting this appeal will rely upon the following points:

1. That the court erred as a matter of fact in finding that defendant and the City of Seattle relied upon the inspection of the Underwriters' Laboratories, Inc., in determining the quality and fitness of the hose.

2. That the court erred as a matter of fact in finding that plaintiff accepted and retained the returned hose for inspection only.

3. That the court erred as a matter of law in holding that there were no implied warranties in the sale of the hose.

4. That the court erred as a matter of law in holding that plaintiff did not agree to a rescission of the sale by accepting and retaining the hose.

5. That the court erred in entering judgment in favor of plaintiff and against the defendant.

Dated this 7th day of March, 1955.

/s/ JOHN C. VEATCH,
Of Attorneys for Defendant-
Appellant.

/s/ MARVIN SWIRE,
Of Attorneys for Plaintiff-
Respondent.

Approved this 7th day of March, 1955.

/s/ GEO. H. BOLDT,
District Judge.

[Endorsed]: Filed March 8, 1955.

[Title of District Court and Cause.]

DECISION

The case has been submitted on the pretrial order, depositions, transcript, exhibits and trial memoranda, all of which have been read and fully considered.

Inasmuch as the Invitation to Bid, defendant's bid and Seattle's acceptance thereof were all expressly predicated on the specification of hose

labeled by Underwriters' Laboratories, Inc., which labeling, as was well known and understood by all parties, could only be procured through the inspection and tests provided for in the Underwriters' brochure entitled "Standard for Cotton Rubber-Lined Fire Hose," I am of the opinion that in the absence of fraud such labeling following such testing as to the quality of the hose was conclusive on all concerned. Accordingly, there was no implied warranty involved in the sale as a matter of law. Defendant refers to no authorities contrary to the cases to such effect cited in plaintiff's memoranda and in the 46 ALR 864 annotation.

If it were assumed that a warranty of fitness for the use intended arose by implication, the burden would rest on defendant to establish by a preponderance of the credible evidence that at the time of delivery to the Seattle Fire Department the hose in fact was defective and unsuited for its intended use. In my opinion the defendant has not met such burden and the evidence preponderates to the contrary. I am satisfied that the hose was fully and properly tested and in nondefective condition at the time of its shipment direct from the factory to the Seattle Fire Department. Defendant's own proof shows that immediately following arrival at Seattle the hose was examined by the purchaser and no visible defect or damage found therein. The scuffings and abrasions later found on the hose and couplings occurred during the period the hose was in the possession of the Seattle Fire Department.

Admittedly the hose was handled by Seattle firemen in the stations, on engines and in a drying tower. It seems incredible to me that damage of the type and extent shown in the photographs and described in the evidence could have been caused in any other manner than by rough handling and/or improper stowage during the period the hose was in Seattle when at all times it was in possession of the Seattle Fire Department. To say the least, the evidence does not preponderate against such a finding. The only other evidence pertaining to the condition of the hose following delivery is that shown by the fire department tests for acid reaction which were negative.

Defendant cannot claim a rescission of its purchase contract from plaintiff unless the City of Seattle had a right to rescind as against defendant. *Vanderpool v. Burkitt*, 113 Ore. 656. As above found, the City of Seattle had no such right and I do not find anything in the record to sustain defendant's contention that plaintiff voluntarily agreed to rescission by receiving the hose for factory inspection when shipped by defendant after rejection by the City of Seattle. I do not interpret any evidence in the record, or inference therefrom, to justify such a finding.

Defendant admits that it has owed plaintiff \$3,387.96 since February 17, 1953 for merchandise purchased from and delivered by plaintiff. The evidence not sustaining defendant's counterclaim, the

same will be dismissed and plaintiff will take judgment in the sum referred to with interest from the date indicated.

Findings, conclusions and judgment in accordance herewith may be prepared, served and forwarded to the Court by mail for signature.

Dated at Tacoma, Washington, this 10th day of November, 1954.

/s/ GEO. H. BOLDT,
United States District Judge.

[Endorsed]: Filed November 11, 1954.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause having been duly and regularly submitted for trial to the Honorable George H. Boldt, Judge of the above-entitled Court, on the pretrial order, depositions, exhibits, trial memoranda and transcript of witnesses' testimony, and the Court having duly considered the evidence and being fully advised in the premises, now makes the following:

Findings of Fact

I.

Plaintiff is a corporation, incorporated under the laws of the State of New Jersey, and defendant is a corporation, incorporated under the laws of the State of Oregon.

II.

Between September 9, 1952, and February 17, 1953, plaintiff sold and delivered to defendant merchandise of the value of \$3,387.96, due on or before February 17, 1953.

III.

No part thereof has been paid.

IV.

On or about February 8, 1952, defendant ordered from plaintiff 4,800 feet of fire hose bearing Underwriters' Laboratories, Inc., inspection labels, to be shipped to the Fire Department of the City of Seattle, Washington, to fill a like order which defendant had received from the Fire Department of the City of Seattle, Washington.

V.

The agreed purchase price for the sale of the hose from plaintiff to defendant was \$5,618.88, and defendant paid said sum to plaintiff on or about April 17, 1952.

VI.

In placing said orders, both the City of Seattle and the defendant relied on the inspections and tests to be made by Underwriters' Laboratories, Inc., for the purpose of determining the quality and fitness of the hose.

VII.

On or about March 26, 1953, plaintiff shipped to the City of Seattle 4,800 feet of fire hose which

had been tested, inspected and approved by inspectors of Underwriters' Laboratories, Inc., and to which were affixed the labels of Underwriters' Laboratories, Inc., all pursuant to and in compliance with the terms of the purchase order of the City of Seattle to defendant and of the purchase order of defendant to plaintiff.

VIII.

The hose was free of defects and was suitable for its intended use at the time it was received by the City of Seattle on or about April 8, 1952.

IX.

In January, 1953, defendant returned the hose to plaintiff, who accepted and retained same for inspection and examination only.

Based thereon, the Court makes the following:

Conclusions of Law

I.

The Court has jurisdiction of the parties and of the cause, based upon diversity of citizenship of the parties and on the amount in controversy herein, being in excess of \$3,000.00, exclusive of interest and costs.

II.

Defendant is indebted to plaintiff in the sum of \$3,387.96 with interest thereon at the rate of 6% per annum from February 17, 1953, until paid, for merchandise sold and delivered by plaintiff to defendant between December 9, 1952, and February 17, 1953.

III.

There were no implied warranties in the sale of the fire hose shipped by plaintiff to the City of Seattle on or about March 26, 1952.

IV.

Plaintiff did not agree to a rescission of the fire hose sale by accepting and retaining the hose when it was returned to plaintiff by defendant in January, 1953.

V.

Defendant is not entitled to rescind its purchase of said fire hose from the plaintiff.

VI.

Plaintiff is entitled to a judgment herein against defendant for the recovery of \$3,387.96 with interest thereon at the rate of 6% per annum from February 17, 1953, until paid, for a dismissal of defendant's counterclaim, and for the recovery of plaintiff's costs and disbursements necessarily incurred.

Dated this 26th day of November, 1954.

/s/ GEO. H. BOLDT,

United States District Judge.

Approved as to form as being in accordance with the written decision of the Court.

November 23rd, 1954.

/s/ JOHN C. VEATCH,

Attorney for Defendant.

[Endorsed]: Filed November 29, 1954.

In the United States District Court
for the District of Oregon

No. Civil 7177

UNITED STATES RUBBER COMPANY, a Corporation,

Plaintiff,

vs.

NELSON EQUIPMENT COMPANY, a Corporation,

Defendant.

JUDGMENT

The trial of the above-entitled cause having been duly, regularly and agreeably submitted to the Honorable George H. Boldt, Judge of the above-entitled Court, on the pretrial order, depositions, exhibits and trial memoranda, and upon the written transcript of the testimony of witnesses taken on March 24, 1954, before and pursuant to the directions of the Honorable James Alger Fee, then a Judge of the above-entitled Court, and the Honorable George H. Boldt, having fully considered all said matters and having made and filed his memorandum decision, findings of fact and conclusions of law, all in favor of plaintiff, now, pursuant thereto, it is hereby

Ordered and Adjudged that plaintiff have and recover judgment against defendant in the sum of \$3,387.96 with interest thereon at the rate of 6% per annum from February 17, 1953, until paid, and for plaintiff's costs and disbursements incurred

herein to be hereafter taxed in the manner provided by law.

It Is Further Ordered and Adjudged that defendant's counterclaim be and the same is hereby dismissed upon the merits and defendant taking nothing thereby.

Dated this 26th day of November, 1954.

/s/ GEO. H. BOLDT,
United States District Judge.

[Endorsed]: Filed November 29, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Nelson Equipment Company, a Corporation, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 29th day of November, 1954.

/s/ JOHN C. VEATCH,
Attorney for Appellant.

[Endorsed]: Filed December 27, 1954.

[Title of District Court and Cause.]

DOCKET ENTRIES

1953

Sept. 11—Filed complaint.

Sept. 11—Issued summons—to marshal.

Sept. 17—Filed summons with marshal's return.

Oct. 1—Filed answer.

Oct. 20—Filed reply.

1954

Feb. 8—Entered order setting for pre-trial conference March 15 and trial March 18, 1954.

Feb. 15—Filed deposition of Clarence Hessey for plntf.

Feb. 23—Filed depositions of Joseph Sipos, John A. Brady and Walter Hellegers.

Mar. 15—Filed depositions of Robert B. Rogers, Clarence G. Steele and Glen Anderson.

Mar. 15—Entered order resetting for pre-trial conference March 17.

Mar. 17—Entered order resetting for pre-trial conference March 18.

Mar. 18—Entered order resetting for pre-trial conference and trial March 24.

Mar. 22—Filed deposition of Jonas R. Smith for plntf.

Mar. 24—Filed stipulation for taking of deposition of Jonas R. Smith.

Mar. 24—Filed stipulation of facts.

Mar. 24—Filed plntf.'s trial brief.

Mar. 24—Filed and entered pre-trial order.

1954

- Mar. 24—Record of trial, order allowing reasonable time for briefs.
- Apr. 6—Filed defendant's trial brief.
- Apr. 6—Filed exhibits 1 to 62.
- Apr. 16—Filed plaintiff's reply memorandum.
- Apr. 16—Filed transcript of proceedings 3-24-54.
- Apr. 18—Entered order taking under advisement.
- Nov. 11—Filed decision of court.
- Nov. 29—Filed and entered Findings of Fact and Conclusions of Law.
- Nov. 29—Filed and entered Judgment for plaintiff (\$3,387.96).
- Nov. 29—Entered judgment in lien docket.
- Dec. 3—Filed cost bill and notice of taxation.
- Dec. 27—Filed notice of appeal by defendant and copy mailed to plaintiff's attorneys.

1955

- Jan. 4—Filed supersedeas bond on appeal.
- Feb. 7—Filed motion for order extending to March 10, 1955, time to file and docket appeal.
- Feb. 7—Filed and entered order extending to March 10, 1955, time to file and docket appeal.
- Mar. 8—Filed agreed statement.
- Mar. 9—Filed designation of record on appeal.
- Mar. 9—Entered order extending time to March 19, 1955, to file and docket appeal.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

United States of America,
District of Oregon—ss.

I, F. L. Buck, Acting Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of complaint, answer, reply, agreed statement, decision, findings of fact and conclusions of law, judgment, notice of appeal, supersedeas bond on appeal, orders extending time, designation of contents of record, and transcript of docket entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 7177, in which the United States Rubber Company is plaintiff and appellee, and the Nelson Equipment Company is defendant and appellant; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that the cost of filing the notice of appeal, \$5.00, has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 10th day of March, 1955.

[Seal] /s/ F. L. BUCK,
Acting Clerk.

[Endorsed]: No. 14688. United States Court of Appeals for the Ninth Circuit. Nelson Equipment Company, a Corporation, Appellant, vs. United States Rubber Company, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed March 11, 1955.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the
Ninth Circuit.



United States
COURT OF APPEALS
for the Ninth Circuit

NELSON EQUIPMENT COMPANY, a corporation,

Appellant,

vs.

UNITED STATES RUBBER COMPANY, a corporation,

Appellee.

APPELLANT'S BRIEF

Appeal from the United States District Court for the District of Oregon.

FILED

MAY 11 1955

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PAUL P. O'BRIEN, CLERK



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United States
COURT OF APPEALS
for the Ninth Circuit

NELSON EQUIPMENT COMPANY, a corporation,

Appellant,

vs.

UNITED STATES RUBBER COMPANY, a corporation,

Appellee.

APPELLANT'S BRIEF

Appeal from the United States District Court for the District of Oregon.

JURISDICTION

This appeal is from a final decision of the District Court of the United States for the District of Oregon, entered on the 29th day of November, 1954, (Tr. 30) and notice of appeal filed on the 27th day of December, 1954, (Tr. 31) and appellate jurisdiction is based on section 1291, Title 28, United States Code Annotated, and Rule 73, Federal Rules of Civil Procedure. The

final decision from which this appeal is taken was entered in a civil action between a corporation organized under the laws of the State of New Jersey, and a corporation organized under the laws of the State of Oregon, for the recovery of a sum of money in excess of \$3,000.00, exclusive of interest and costs (Tr. 3) and jurisdiction of the District Court is based on section 1332, Title 28, United States Code Annotated.

STATEMENT

United States Rubber Company, the appellee, is a manufacturer of fire hose at Passaic, New Jersey, under the trade name of "Eureka" hose. Nelson Equipment Company, the appellant, was the authorized distributor of Eureka hose in the states of Oregon, Washington, Idaho and the Territory of Alaska (Tr. 7). Appellant would notify appellee of advertisements for bids on fire hose and obtain from appellee an invoice price and, in the event appellant's bid was accepted, would pay appellee the invoice price and bill the customer for the bid price (Tr. 8). In January, 1952, appellant notified appellee of a call for bids by the City of Seattle, Washington, for two lots of fire hose—one for 3½ inch hose, which is not involved in this case, and one for 4800 feet of 2½ inch hose. Appellant was the successful bidder for both lots. The order for the 2½ inch was for 4800 feet of Eureka hose to be delivered to the fire department at Seattle, Washington, each section to bear the label of the Underwriters' Laboratories, Inc. (Tr.

10). The hose was delivered at Seattle on April 8, 1952, and on April 17, 1952, appellant paid appellee the invoice price of \$5,618.88 (Tr. 11).

The hose was delivered in 96 sections and was inspected by members of the fire department and was apparently free from defects. On April 29 and 30, it was distributed to two different engine companies in lots of 48 sections each. On May 10, 1952, it was found that there were breaks in the fabric of the outer jackets of 37 sections delivered to one engine company (Tr. 12-13). This hose had never been put in use or handled except to stencil, drain and hang in the drying tower (Tr. 15). These sections were rejected and on May 28, 1952, appellant notified appellee of the defects and asked for instructions and was instructed by appellee to submit the hose to the Underwriters' Laboratories for a report. Several sections were sent to the Underwriters but a report was not received from the Underwriters until October 27, 1952.

In the meantime, on September 4, 1952, a representative of the fire department, a representative of the Underwriters' Laboratories and the manager of appellant's Seattle plant inspected the rejected 37 sections and made various tests to try to determine what was wrong with the hose but were unable to find the cause of the defects (Tr. 13). As a result of this inspection, the fire department decided to inspect the entire lot and found 22 additional sections with holes in the outer jackets (Tr. 14-15) and then rejected the entire lot. The remaining hose was kept in service by the fire depart-

ment at the request of the manager of appellant's Seattle plant until January 23, 1953, until appellant could get word from appellee, but appellant was finally told by the fire department that the hose was needed and that the entire lot would have to be replaced (Tr. 19).

On November 7, 1952, appellant forwarded to appellee the Underwriters' report of October 27, 1952, and notified appellee that the city had rejected the entire lot and asked for instructions but received no reply. Between that date and January 6, 1953, appellant repeatedly requested a reply to the letter of November 7, without result (Tr. 16-17). On December 18, 1952, appellant demanded that appellee either replace the hose or refund the purchase price (Tr. 17-18). On January 6, 1953, appellant notified appellee that the hose was being held awaiting appellee's order and on January 16, appellee was notified that the hose was being returned, collect (Tr. 17). The hose was received and retained by appellee and appellant was never notified as to the disposition made of it (Tr. 18) and appellee retained the hose and the purchase price.

Appellant was indebted to appellee in the sum of \$3,387.96 on other items and appellee filed action to collect the same, which indebtedness appellant admitted but counterclaimed for the sum of \$5,618.88, the amount it had paid for the rejected hose. The trial court rejected appellant's counterclaim and gave appellee judgment for the amount of its demand from which judgment this appeal is prosecuted.

The trial court found as a matter of fact that appellant relied on the inspection of the Underwriters' Laboratories, Inc., as to the fitness of the hose; that the hose was free from defects when received by the city and that the appellee accepted a return of the hose and retained the same for inspection only (Tr. 27-28) and upon these findings concluded that there was no implied warranty as to the fitness of the hose and that there was no rescission of the contract of purchase (Tr. 29).

I.

THE TRIAL COURT ERRED IN HOLDING THAT THERE WAS NO IMPLIED WARRANTY

POINTS AND AUTHORITIES

Where the buyer, expressly or by implication, makes known to the seller that particular purpose for which goods are required, and it appears that the buyer relies upon the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.

Sec. 75.150 (1) Oregon Revised Statutes.

If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or have reached the place agreed upon.

Sec. 75.190 (5) Oregon Revised Statutes.

Implied warranties are not defeated by an inspection by the buyer unless the defects are such as should have been revealed by the inspection.

Barrett Co. v. Panther Rubber Mfg. Co., 24 F. 2d 329.

Willig v. Brethauer (Cal.), 274 P. 2d 202.

The buyer is not bound by an inspection by a third party unless such party was acting as agent of the buyer.

Smith v. Great Atlantic & Pacific Tea Co., 170 F. 2d 474.

ARGUMENT

The basis of the trial court's conclusion that there was no implied warranty is set forth in the court's decision:

"Inasmuch as the Invitation to Bid, defendant's bid and Seattle's acceptance thereof were all expressly predicated on the specification of hose labeled by Underwriters' Laboratories, Inc., which labeling, as was well known and understood by all parties could only be procured through the inspection and tests provided for in the Underwriters' brochure entitled 'Standard for Cotton Rubber-Lined Fire Hose,' I am of the opinion that in the absence of fraud such labeling following such testing as to the quality of the hose was conclusive on all concerned. Accordingly there was no implied warranty involved in the sale as a matter of law. Defendant refers to no authorities contrary to the cases to such effect cited in plaintiff's memoranda and in the 46 ALR 864 annotation." (Tr. 23-24)

It is obvious that a buyer is not bound to accept merchandise regardless of its condition at the time of

delivery and the passing of title simply because that merchandise was in first class condition at some time in the past. In many sales merchandise is accepted upon the inspection of a third party but only in those instances where the one making the inspection is acting as the agent of the buyer or both the buyer and seller. The cases referred to by the trial court relate to those instances where there is a delivery and acceptance, either actual or constructive, at the point of origin and not at the point of destination. If the trial court's conclusion be correct, the Underwriters' Laboratories were acting as the agent of the City of Seattle in accepting the hose. There is no evidence to support this conclusion. The only evidence is, that the purpose of requiring the Underwriters' label is to show that it was manufactured according to certain standards so that an analysis of each lot of hose is unnecessary and to insure uniformity in bids (Tr. 12, 19). The brochure referred to by the trial court is entitled, "Standard for Cotton Rubber-Lined Fire Hose." The Underwriters' inspection had no reference to the contract of sale and the certification that the hose was manufactured according to certain standard did not constitute an acceptance by the City of Seattle.

A similar case is *Smith v. Great Atlantic & Pacific Tea Co.*, 170 F. 2d 474. A quantity of canned spinach was purchased from Smith under a contract specifying that Government grade certificates be attached to the invoices. The goods were shipped with a United States Department of Agriculture certificate attached to the bill of lading certifying the grade to be U. S. Grade C

or U. S. Standard. The purchaser paid the invoice and distributed part of the goods to its customers. It was subsequently discovered that the spinach was not of merchantable quality because it contained plant lice or aphids. The seller claimed that there was no implied warranty because of the Government inspection and certification. It was held that the Government inspector was not the agent of the buyer in making the inspection; that the buyer did not know what inspection had been made and even if the inspector could be considered the agent of the buyer, it would not defeat the implied warranty unless it could be shown that the inspection should have revealed the defect in the goods.

An implied warranty applies even where the buyer inspects the goods before acceptance unless the defects were such as should have been revealed by such inspection. In *Barrett v. Panther Rubber Mfg. Co.*, 24 F. 2d 329, the rubber company was the manufacturer of rubber heels and purchased from Barrett Co. a large quantity of an oil product to be used for softening scrap rubber used in the heels. Barrett Co. knew the purpose for which the oil was to be used and before the purchase was made furnished the rubber company with some of the oil for trial and the heels manufactured with its use appeared to be satisfactory. A large quantity was then purchased and heels manufactured with its use were distributed to jobbers. Several months later a green bloom appeared on these heels which made them unmerchantable. It was held that there was a latent defect in the oil product which made it unfit for its intended use and this defect could not be ascertained from

the buyer's inspection and since the seller knew the purpose for which the oil was to be used, there was an implied warranty that it would be suitable for that use.

In *Willig v. Brethauer* (Cal.), 274 P. 2d 202, the defendant was engaged in the business of raising pure bred hereford cattle and in furnishing herd sires. Plaintiff and his ranch manager visited defendant's ranch and inspected a number of sires and selected one for which plaintiff paid defendant a substantial price. It subsequently developed that the animal purchased was physically unfit for breeding purposes. It was claimed that there was no implied warranty because the buyer had made his own inspection before purchase. Held that the buyer's inspection did not defeat the implied warranty as the defect was not of a nature that would have been revealed by the inspection.

The trial court found that the hose was fit for its intended use when delivered to the fire department at Seattle. The court in its decision says:

"Defendant's own proof shows that immediately following arrival at Seattle the hose was examined by the purchaser and no visible effect or damage found therein. The scuffings and abrasions later found on the hose and couplings occurred during the period the hose was in the possession the Seattle Fire Department. Admittedly the hose was handled by Seattle firemen in the stations, on the engines and in a drying tower. It seems incredible to me that damage of the type and extent shown in the photographs and described in the evidence could have been caused in any other manner than by rough handling and/or improper storage during the period the hose was in Seattle when at all times it

was in the possession of the Seattle Fire Department." (Tr. 24-25)

The hose was apparently free from defects when it was delivered to the fire department (Tr. 12); when it was returned to appellee's factory it was unfit for use as fire hose (Tr. 14, 21). From these facts alone, it might properly be inferred that the hose was damaged while in the possession of the fire department. However, an inference has no evidentiary force against positive testimony to the contrary. The court infers from the appearance of the hose after its return that it was damaged by the fire department. There is direct evidence that defects appeared in 37 sections within a few days after delivery; that this hose had never been put in use and was only handled in stenciling, hanging up to dry and put on the fire apparatus (Tr. 15-16); that these sections were examined and tested by a representative of the fire department and a representative of the Underwriters' Laboratories and there were unable to determine the cause of the breaks in the outer jackets (Tr. 13).

"Inferences or presumptions speak in the absence of evidence but cannot be weighed in the balance against evidence."

Guaranty Trust Co. v. Minneapolis St. P. R. Co.,
36 F. 2d 747.

An inference or presumption has no evidentiary force against positive evidence to the contrary."

Arasi v. Orient Ins. Co., 50 F. 2d 548.

"A presumption cannot be weighed as against evidence, and does not constitute affirmative proof. It takes the place of evidence; but when there is

evidence upon an issue presumption as to that issue disappears.”

Miller v. Union Pacific Co., 63 F 2d 574.

The defects in this hose consisted of the failure of the fabric of the outer jacket to stand up. Two lots of hose were purchased by the city at the same time and no defects were found except in this particular lot (Tr. 18). When the hose was inspected by the Underwriters before shipment, one section was rejected for defects in the jacket (Tr. 21). Within a few days after delivery defects appeared in 37 sections delivered to one engine company before the hose was put in use (Tr. 15). Within a few months defects appeared in 22 additional sections delivered to another engine company (Tr. 14) and when the hose was returned to appellee all but 12 of the 96 sections were defective (Tr. 21). All of the defects consisted of breaks in the fabric of the outer jackets. Appellee was notified of the nature of the defects on May 28, 1952 (Tr. 16). The hose was inspected upon its return at appellee's factory between February 11 and 16, 1953, but no tests were made of the fabric in the jackets (Tr. 21), but the appellee's claims manager concluded that if the damage had been due to defects in the jackets the breaks would have been clean but instead the damage consisted of tears in individual strands indicated that it was only from wear as a result of the hose rubbing against another object (Tr. 21). The Underwriters' representative at appellee's factory says that it was apparent that the damage was caused by external action (Tr. 22). Assuming that the damage was only from wear and was caused by external

action does not support an inference that the hose was misused by the fire department. Good fire hose should last from 10 to 15 years according to the fire department (Tr. 14) and should last the average city several years according to appellee (Tr. 21) and it is a matter of common knowledge that fire hose does receive wear and does come in contact with other objects and when hose which should last for several years develops defects which make it unfit for use in less than a year and there is no evidence that it received any unusual treatment or use but there is evidence that it was handled in the usual manner, a finding that it was suitable for the use for which intended when received and a conclusion that there was no implied warranty of fitness is not supported by the facts or the law.

II.

THE TRIAL COURT ERRED IN HOLDING THAT APPELLEE DID NOT ACCEPT A RESCISSION OF THE PURCHASE CONTRACT

POINTS AND AUTHORITIES

The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after a lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

Sec. 75.480 Oregon Revised Statutes.

The rule requiring a person who has an election to rescind to act promptly is equally applicable to a party to whom rescission is tendered and who is thus given an election to accept or refuse it.

17 C.J.S. p. 919.

A mutual rescission may be established by conduct as well as by explicit agreement and where a vendee declares an intention to rescind, it is incumbent upon the vendor to either affirm or disaffirm the contract, and where the vendor thereafter accepts a return of the property and exercises any dominion over it, it amounts to a concurrence in the rescission.

Gray v. Mitchell, 145 Or. 519.

ARGUMENT

We find no exceptions to the principles announced in the authorities quoted. The trial court concludes that the appellant was not entitled to rescind the purchase contract (Tr. 29). Whether or not the appellant was entitled to rescind is immaterial if it offered to rescind and the rescission was accepted by the appellee, as a matter of law, the contract was terminated. The trial court finds that the appellant returned the hose and the appellee accepted and retained the same for inspection and examination only (Tr. 28). This finding is not supported by any evidence in the record.

Appellant's president says that in a telephone conference with appellee's sales manager on December 18, 1952, he told the sales manager that appellant would

either have to have a replacement of the hose or a refund of the purchase price (Tr. 18). On January 16, 1953, appellant's manager notified the sales manager that appellant had no alternative but to return the hose and that it was being shipped back, collect (Tr. 17). Appellee's sales manager admits that appellant demanded a replacement of the hose but says that appellant was told that this could not be done until the factory had a chance to examine the hose and see whether it was defective or had been damaged by the customer and that the usual procedure was to ship the hose to the factory collect, for examination (Tr. 17-18). The hose was returned and accepted by the appellee. If as claimed it was accepted only for examination, the appellee had a right to retain it for a reasonable time for that purpose, but it had no right to retain it for any purpose of its own or to keep both the hose and the purchase price.

The trial court's finding that the hose was retained for examination only is contrary to the evidence. The hose was received at appellee's factory on February 11, 1953, was inspected and a report made to the sales department on February 16, 1953. It was then inspected by a representative of the Underwriters on April 10, 1953 (Tr. 20-21). If received only for the purpose of inspection that purpose was accomplished on April 10, 1953, but it was retained at the factory until August, 1953, and then transferred to appellee's warehouse "where it is now located" (Tr. 21). After the inspection, the hose was retained at the factory wholly for a purpose of appellee—awaiting instructions from appellee's

sales department as to its disposition (Tr. 21). No notice was ever given appellant that appellee refused to accept return of the hose; no offer was ever made to return it to appellant; no notice was given that it was being held awaiting appellant's order. Appellant never knew where the hose was or what was done with it until revealed by the testimony in the trial court (Tr. 18).

CONCLUSION

When an article is purchased for a particular use which normally would be suitable for that use for a period of several years and becomes totally unfit for that use in less than a year, either there was a defect in the article itself or it was used for some purpose for which it was not intended. There is evidence in this case as to the use of the hose while in possession of the Seattle fire department. There is no evidence that there was any use out of the ordinary but the trial court infers from the appearance of the hose after its return that it was misused and this inference is all that supports the trial court's conclusion that the hose was free from defects when delivered and that there was no breach of the implied warranty of fitness.

Regardless of whether or not the purchaser had a right to rescind the contract of purchase, it tendered a rescission and returned the hose to the seller. The seller had the option to affirm or disaffirm the rescission by refusing to accept the return, by holding it subject to the purchaser's order or by storing it in the purchaser's

name, but it did none of these things. It retained both the hose and the purchase price and never recognized the purchaser's claim to either. There is no rule of law or equity to sustain the trial court's conclusion that the appellant is not entitled to a return of the purchase price.

The judgment of the trial court should be reversed and judgment for appellant as prayed for in its answer should be entered herein.

Respectfully submitted,

Attorneys for Appellant.

United States
COURT OF APPEALS
for the Ninth Circuit

NELSON EQUIPMENT COMPANY, a corporation,

Appellant,

vs.

UNITED STATES RUBBER COMPANY, a corporation,

Appellee.

APPELLEE'S BRIEF

Appeal from the United States District Court for the District of Oregon.

FILED

JUN - 6 1955

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PAUL P. O'BRIEN, CLERK



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United States
COURT OF APPEALS
for the Ninth Circuit

NELSON EQUIPMENT COMPANY, a corporation,

Appellant,

vs.

UNITED STATES RUBBER COMPANY, a corporation,

Appellee.

APPELLEE'S BRIEF

Appeal from the United States District Court for the District of Oregon.

I

TO APPELLANT'S FIRST ASSIGNMENT OF ERROR

POINTS AND AUTHORITIES

1. When parties to a contract of sale agree that the quality shall be determined by the inspection of a third party, such inspection is conclusive in the absence of fraud, collusion or bad faith.

Pacific Commercial Co. v. Greer (Dist. Ct. of Ap., Cal., 1933), 19 P. 2d 543.

- Amos v. Walter N. Kelley Co. (Mich., 1927), 215 N.W. 397.
 Federal Grain Co. v. Hayes Grain & Commission Co. (Ark., 1923), 255 S.W. 307.
 Herman H. Hettler Lumber Co. v. Olds (CCA 6, 1915), 221 Fed. 612.
 Citizens, Independent Mill & Elevator Co. v. Perkins (Okl., 1915), 152 Pac. 443.
 Gorham v. Dallas, C. & S. W. Ry. Co. (Tex., 1907), 106 S.W. 930.
 Field v. Descalzi (Pa., 1923), 120 Atl. 113.

2. When the buyer does not rely upon the seller's skill or judgment there is no implied warranty as to fitness.

ORS 75.150 (1).

Pacific Commercial Co. v. Greer (Dist. Ct. of Ap., Cal., 1933), 19 P. 2d 543.

3. Uncontradicted testimony need not be followed if inherently improbable, or if disproved by physical facts.

Quock Ting v. United States, 1891, 140 U.S. 417, 35 L. Ed. 501, 11 Sup. Ct. 733.

Grace Bros., Inc. v. Commissioner of Internal Revenue (CA 9, 1949), 173 F. 2d 170.

4. Unless clearly erroneous, the findings of the trial court are conclusive.

Fed. Rules of Civil Proc., Rule 52 (a).

ARGUMENT

(a) The assignment raises an abstract question.

The trial court found there was no implied warranty because the contract called for inspection by Under-

writers' Laboratories, Inc. and such inspection, in the absence of fraud, collusion or bad faith, was conclusive. Appellant's first assignment of error attacks this finding. Said assignment raises a purely abstract question which is not in any way determinative of this appeal for the following two reasons:

(1) Appellant's second assignment of error appears to rely upon a mutual, contractual rescission rather than a unilateral rescission for breach of warranty. If our understanding of appellant's ground for rescission (as above stated), is correct, then the question whether or not an implied warranty existed becomes wholly immaterial because a contractual rescission is not at all dependent upon the existence of a warranty and, further, because appellant is not relying upon a breach of warranty as the ground for its rescission.

(2) The trial court found that even if there were an implied warranty as to quality, appellant failed to prove a breach thereof (Tr. 24, 28).

The finding that the hose was of good quality is predicated upon substantial and credible testimony and on physical facts. Appellee's claim agent, Hellegers, and an inspector from Underwriters' Laboratories, Inc., McNabb, each testified (Tr. 21, 22), that in the damaged areas the hose was dirty and the threads were abraded and scuffed, all of which indicate that the damage was caused by the hose rubbing against another object; that if the damage had been due to defects the breaks in the thread would have been clean breaks. The trial court relied upon this testimony, on photographs and

on the admitted fact that every section of hose, when received by the City of Seattle, was examined for defects and none were found. The damage occurred after the hose had been in the possession of the Seattle Fire Department and handled by them.

The finding of the trial court that the hose, when delivered, was not defective and was fit for its intended use, must be accepted on this appeal. This finding, alone, fully disposes of appellant's first assignment of error.

(b) On the merits.

The City of Seattle purchase order required "each and every section [of the hose] to bear label of Underwriters' Laboratories, Inc." (Tr. 10). The only factor considered by the City of Seattle in determining whose bid to accept was price (Tr. 12).

Label of Underwriters' Laboratories, Inc. denotes that the hose was manufactured according to certain minimum standards (Tr. 19) and that it was subjected to various tests designed to determine the fitness, quality and performance of the hose (Tr. 20).

As required by the purchase order, every section of hose involved in this case was so tested by a representative of Underwriters' Laboratories, Inc., was found satisfactory, and a label was affixed thereto in evidence thereof (Tr. 11, 22).

It is firmly established that where the parties agree that quality shall be determined by inspection of a third

party, such inspection, whether expressly made so or not, is conclusive. The foregoing facts bring the case within this rule, as indicated by the following authorities:

In *Pacific Commercial Co. v. Greer* (Cal., 1933), 19 P. 2d 543, plaintiff ordered wire rope from defendant, requiring same to be inspected by Hunt & Co., who made the inspection and enclosed its certificates in evidence thereof. As to the conclusive effect of the inspection the court said (19 P. 2d 545):

“Each of appellant’s orders contained the requirement that the rope should be inspected by Hunt & Co. This inspection was made before the delivery of the rope. Therefore appellant did not rely upon respondent’s judgment of the quality or length of said rope, but, on the contrary, upon the inspection made by Hunt & Co.

“In *California Sugar, etc., Agency v. Penoyar*, 167 Cal. 274, 279, 139 P. 671, 673, the court said: ‘Nothing is better settled than the rule that where the parties agree that the performance or non-performance of the terms of a contract, or the quantity, price or quality of goods sold, is to be left to the determination of a third person, his judgment or estimate is binding, in the absence of fraud or mistake’ ”.

In *Amos v. Walter N. Kelley Co.* (Mich., 1927), 215 N.W. 397, defendant ordered lumber of certain specifications with inspection to be made by a lumber association. Nothing in the contract was said as to the conclusive effect of the inspection but the court held that, having been agreed upon, it was binding on both parties. The court said (215 N.W. at p. 399):

"In the instant case inspection by an inspector of the National Hardwood Association was agreed upon. In *Walter N. Kelley Co. v. Andrews*, 225 Mich. 403, 196 N.W. 407, it was said by Mr. Justice Sharpe, speaking for the court: 'The purpose of agreeing on an inspector is to prevent disputes arising after shipment. In the absence of fraud or mistake, the result of the inspection made by a man agreed upon is conclusive between the parties'.

"There is no testimony tending to show fraud or mistake of the inspector, and the inspection was binding on the parties."

In *Federal Grain Co. v. Hayes Grain & Commission Co.* (Ark., 1923), 255 S.W. 307, the purchase order designated No. 3 oats at "Kansas City grades and weights". The oats were inspected at Kansas City by a state inspector and were certified as No. 3 oats. Plaintiff brought action for breach of warranty because when the oats arrived at Little Rock, Arkansas they were found to be No. 4 oats by a federal inspector. The court held that plaintiff, having called for a Kansas City inspection was bound thereby unless the results of the inspection were procured by fraud or bad faith.

To like effect is *Citizens, Independent Mill and Elevator Co. v. Perkins* (Okl., 1915), 152 Pac. 443, where the court gave a conclusive effect to an inspection made pursuant to a purchase order reciting "Your weights and Wichita grades".

In *Gorham v. Dallas, C. & S. W. Ry. Co.* (Tex., 1907), 106 S.W. 930, the contract provided "material to be subject to Hunt's inspection at buyer's cost". The court said (106 S.W. p. 933):

"The effect of this phrase in the contract was to constitute Hunt or Hunt & Co., in the matter of inspecting the material, the agent of both parties, and was conclusive on them, unless there was bad faith in the matter of inspection."

In *Field v. Descalzi* (Pa., 1923), 120 Atl. 113, the purchase order required "state inspection". In giving conclusive effect to the inspection made pursuant thereto, the court said (120 Atl. at p. 114):

"He may by contract provide the manner in which the examination shall be made, and, when he does so, is concluded by his stipulation. So, it may be agreed that the approval of some third party shall be deemed sufficient, and, when this is pronounced in good faith, the vendee will be bound by the decision given (citing cases) . . .

* * *

" . . . legislation was passed in Texas, governing the standards of tomato packs within its jurisdiction, and a duly appointed officer was directed to exercise the proper supervision, and issue an official certificate showing the true state of facts. There can be no doubt that it was this investigation which was referred to in the telegrams between the parties in the present case. To hold otherwise would render meaningless the contention appearing therein of 'state inspection'. This was made, and the certificate, offered upon the trial, showed the goods at the place of loading conformed to the offer accepted. In the absence of some proof that the inspector acted fraudulently, or in collusion with the vendor, *his approval was correctly treated as conclusive . . .*" (Italics supplied)

Under the Uniform Sales Act, there is an implied warranty as to fitness only when "it appears that the buyer relies on the seller's skill or judgment". ORS 75.150 (1).

The City of Seattle placed no reliance upon its seller's skill or judgment, as the only factor which it considered was price (Tr. 12). Therefore, under the express provisions of the Uniform Sales Act, and as held in *Pacific Commercial Co. v. Greer*, supra, the inspection rather than the seller's judgment having been relied upon, there can be no implied warranty as to fitness, and the City of Seattle could not have rescinded from appellant.

Appellant cannot rescind from appellee unless the City of Seattle had a right to rescind as against appellant. *Vanderpool v. Burkitt*, 113 Or. 656, 234 Pac. 289.

(c) Answer to appellant's argument.

At page 7 of its brief appellant argues that inspection of a third party is binding only where such party is the buyer's agent and that Underwriters' Laboratories was not the agent of the City of Seattle in the inspection of the hose.

Appellee disagrees with that contention. The City of Seattle, having designated Underwriters' Laboratories, and it only, to inspect and certify, the City of Seattle thereby constituted Underwriters' Laboratories as its agent for that purpose.

Next, appellant cites the following named cases, which are distinguishable on the following grounds:

Smith v. Great Atlantic and Pacific Tea Co., 170 F. 2d 474:

1. The subject matter, spinach, was inspected and certified *before* the sale, and the seller's offer expressly

warranted inspected and certified spinach. An inspection under these circumstances is clearly not binding on a subsequent buyer.

2. The inspection was only of "some of the cans in each lot (12 in one and 9 in the other)" and "it was not disclosed what tests were made by him," whereas in the case at bar, each and every section of hose was examined and fully tested, and the tests were fully described and disclosed in the brochure referred to in the written decision of the trial court (Tr. 23) and entitled "Standard for Cotton Rubber Lined Fire Hose".

Barrett Co. v. Panther Rubber Mfg. Co., 24 F. 2d 329, and *Willig v. Brethauer* (Cal.), 274 P. 2d 202: neither of these cases involves inspection by a third party, and in both the buyers were relying upon the skill, judgment and representations of the seller, whereas in the case at bar the City of Seattle relied solely upon the inspection of Underwriters' Laboratories, Inc., and it placed no reliance upon the skill or judgment of appellant or appellee.

Commencing at page 10 of its brief, appellant attacks the finding of the trial court that the hose was of good quality when delivered and that the damage resulted from misuse while in the hands of the City of Seattle. Appellant argues that this finding is based upon inference, that appellant's evidence is uncontradicted to the effect that the hose was not misused while in the possession of the City of Seattle, and appellant then concludes with the point that the inference is dissipated by the uncontradicted evidence.

The only evidence offered by appellant as to the use to which the hose was subjected was through the witness Anderson. His testimony covered the period April 30 to May 9, 1952, and pertained to the 48 sections delivered to Engine Co. 18 (Tr. 15). No evidence was offered as to the use to which this same hose was subjected between the date of its receipt on April 8, 1952 and until April 30, 1952 nor was any evidence offered as to the use to which the remaining 48 sections delivered to Engline Co. 6 were subjected from the date of its receipt on April 8, 1952 until its return on Jan. 23, 1953.

The physical facts are that in the areas of damage the hose was dirty and individual strands of thread were torn, indicating that the damage occurred as a result of the hose rubbing against another object. Photographs of the damage were received in evidence and referred to in the decision of the trial judge. Both appellee's claim agent and an inspector of Underwriters' Laboratories, Inc., each an expert as to all matters pertaining to fire hose, testified that in their opinion the damage was caused from friction and mishandling and that there were no defects in the hose itself because, if there had been, the breaks in the cotton jacket would have been clean breaks instead of tears in individual strands (Tr. 21, 22).

It is to be concluded from the evidence:

1. The hose, when received by the City of Seattle, was carefully inspected by it, was found to be free of any defects, and was accepted.

2. The damages to the hose occurred after it came into the possession of the City of Seattle.

3. Except for the period April 30 to May 10, 1952 covering 48 sections only, there is no evidence as to the manner in which the hose was handled by the City of Seattle.

4. The physical condition of the hose when returned to appellee indicates that the damage occurred as a result of mishandling.

There is no basis for rejecting the finding of the trial court to the effect that the hose was of good quality when delivered. Anderson's testimony, even if uncontradicted, was inadequate and was disproved by the physical facts.

II

TO SECOND ASSIGNMENT OF ERROR

POINTS AND AUTHORITIES

1. An agreement to rescind is itself a contract and like any other contract it requires an offer and acceptance.

12 Am. Jur. 1011 (Contracts, Sec. 431).

2. In order to rescind for breach of warranty, a buyer must act promptly upon discovery of the breach, by notifying a seller of his intention to rescind and by returning or offering to return the purchased property. An

unreasonable delay in so doing precludes rescission and constitutes an affirmation of the contract.

ORS 75.690 (3).

3 Williston on Sales, 350 (Revised Edition).

Anno. 72 ALR 726, 772 to 784.

3. The receipt and retention by seller of merchandise returned by a buyer does not imply an agreement to rescind.

Jackson v. Miles F. Bixler Co. (Miss., 1930), 127 So. 270.

J. B. Colt Co. v. Hayenga (S.D., 1927), 217 N.W. 187.

ARGUMENT

On April 29, 1952, 48 sections of the hose were delivered to Engine Company 6 and on April 30, the remaining 48 sections were delivered to Engine Company 18 (Tr. 12). On May 10, 1952, 37 of said sections at Engine Company 18 were discovered to be damaged and on May 27 were returned to appellant (Tr. 12, 13).

On September 23, 1952, the 48 sections delivered to Engine Company 6 were inspected and 22 sections were found damaged (Tr. 14).

The decision of the City of Seattle to rescind was based entirely and solely upon the damage in the 37 sections discovered in May and upon the inspection made on September 23 (Tr. 14). However, all the hose, save only the 37 sections returned in May, were kept in use and service by the City of Seattle until January 23, 1952, which was four months after the final inspection of September 23rd.

It is axiomatic that in order to rescind for breach of warranty the buyer must return or offer to return all the property promptly upon discovery of the breach, and that any delay in returning the property, and particularly continuing to use it constitutes an affirmation of the contract and precludes the buyer from rescinding. Authorities in support thereof appear under appellee's Point 2 above.

Appellant, apparently recognizing the impossibility of establishing a timely rescission under the Uniform Sales Act, makes no attempt to even do so but instead contends that under the facts appellant and appellee mutually agreed to rescind the contract. A mutual rescission is itself a contract and like any other contract requires an offer and acceptance.

"However, to have the effect of discharging a contract, an agreement of rescission must be a valid agreement. Two minds are required to change the terms and conditions of a contract after it is executed. As a contract is made by the joint will of two parties, it can be rescinded only by the joint will of the two parties. It is obvious that one of the parties can no more rescind the contract, without the other's express or implied assent than he alone can make it." 12 Am. Jur. 1011 (Contracts, Section 431).

Appellant contends that appellee agreed to rescind by accepting a return of the hose and paying for the freight charges thereon. In considering this question, it is important to note that we are dealing with a fully executed contract. Appellee had delivered the goods almost a year before they were returned to it. Appellant had paid for them at that time. On January 23, 1953,

appellant shipped the goods back to appellee and by February 23, 1953 appellant was indebted to appellee in the sum of \$3,387.96 on other items for which appellee billed appellant monthly (Tr. 9). This, in and of itself, negatives any implication that appellee intended to receive the goods for credit, for in order that there be a mutual rescission it would be essential for appellee to agree to return the purchase price. There is nothing whatsoever in the record to indicate that, by accepting a return of the goods for the purpose of testing them to see whether the claim of defect in manufacture was well founded, appellee agreed to pay for them if it did not find them to have been of defective manufacture. It was appellee's practice to inspect all goods returned for claimed defects and to act in accordance with its inspection (Tr. 18).

The inspection was made on March 13, 1953 by a representative of Underwriters' Laboratories, Inc. (Tr. 22). Appellee was notified by letter from Underwriters' Laboratories dated April 10, 1953 of the result of this inspection and on May 1, 1953 appellee wrote appellant advising it thereof and that there were no defects in manufacturing. Both of said letters were offered and received in evidence. There is nothing in these facts to create an implication that appellee agreed to pay for the goods when they were returned and yet that is the only way a contractual rescission could take place. Acceptance of a return shipment by the seller does not imply an agreement to rescind. *Jackson v. Miles F. Bixler Co.* (Miss., 1930), 127 So. 270; *J. B. Colt Co. v. Hayenga* (S.D., 1927), 217 N.W. 187.

Appellant cites *Gray v. Mitchell*, 145 Or. 519, 28 P. 2d 631, for the proposition that a mutual rescission may be established by conduct and that where a vendee declares an intention to rescind it is incumbent upon the vendor either to affirm or disaffirm.

While in the case of an executory contract, as in *Gray v. Mitchell*, supra, it may be incumbent upon a vendor to make an election after the vendee declares an intent to rescind, this most certainly is not true in the case of a fully executed contract, as in the case at bar.

An examination of *Gray v. Mitchell*, supra, reveals that same involved an executory contract of sale of real property and said contract provided for forfeiture in the event of breach by the vendee. When in that case, the vendor received the keys from the vendee after breach, there was nothing further to be done to consummate the termination of the contract and, consequently, an intent to consider the contract at an end under and pursuant to the forfeiture provision thereof could be inferred. Here, however, there was necessarily another factor in a rescission of the contract, as evidenced by appellant's counterclaim herein, to-wit, the return of the purchase price; and at no time did appellee, by accepting a return for inspection, imply that it intended to refund the price. No such implication, of course, was necessary in the *Gray* case. Here not only did it not exist, but it was expressly dissipated even had it existed, by the monthly statements which appellee addressed to appellant demanding payment of the balance for which appellee recovered judgment herein.

On pages 14 and 15 of appellee's brief it asserts that the hose was retained after the April, 1953 inspection by the appellee for its own purposes and that it gave no notice to appellant of appellee's refusal to accept a return of the hose.

In making this contention, appellant overlooks completely said letter of May 1, 1953 received in evidence as Exhibit "36", in which the most unequivocal terms, appellee advised appellant there were no defects in the hose.

Appellee's claim agent, Mr. Hellegers, testified (Tr. 21) that he continued to hold the hose until August, 1953 when he transferred it to appellee's warehouse as customer's property.

Following its receipt of the May 1 letter, appellant was fully aware that appellee would not return the purchase price and that the hose was held as appellant's property. Yet, appellant made no effort to secure a return of the hose and appellee was under no duty to do anything other than store same for appellant until it received further instructions as to appellant's wishes.

CONCLUSION

Appellant's assignment of error to the trial court's finding that there was no implied warranty raises a purely abstract question because (1) appellant does not base its rescission on breach of warranty, and (2) the trial court found that even if there were an implied warranty as to quality there was no breach thereof as the hose, when delivered, was free of defects and of good quality. This latter finding is supported by substantial, credible evidence and should not be disturbed on appeal.

A mutual rescission, like any other contract, requires mutual assent. In order for mutual rescission to exist appellant must show that appellee agreed to retake the hose and return the purchase price. The evidence establishes the contrary, namely, that appellee refused to refund the purchase price or to retake the hose.

The Seattle fire department having retained the hose in service and use until January 23, 1953, which was four months after its final inspection resulting in its decision to return the hose, the City of Seattle and the appellant were precluded from rescinding even if they had grounds therefor. The retention and use of the hose either voluntarily by the city, or at the request of appellant at least four months after the defects were discovered, constitutes affirmance of the contract as a matter of law.

Appellant apparently recognizes its inability, for the foregoing reasons, to assert rescission based upon breach of warranty and therefore has, instead, attempted to

base same upon a mutual agreement to rescind. But appellant's contention for mutual rescission is unsupportable as a matter of law under the facts of this case.

Respectfully submitted,

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United States
COURT OF APPEALS
for the Ninth Circuit

NELSON EQUIPMENT COMPANY, a corporation,

Appellant,

vs.

UNITED STATES RUBBER COMPANY, a corporation,

Appellee.

APPELLANT'S REPLY BRIEF

Appeal from the United States District Court for the District of Oregon.

FILED

JUN 18 1955

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United States
COURT OF APPEALS
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NELSON EQUIPMENT COMPANY, a corporation,

Appellant,

vs.

UNITED STATES RUBBER COMPANY, a corporation,

Appellee.

APPELLANT'S REPLY BRIEF

Appeal from the United States District Court for the District of Oregon.

ARGUMENT

Appellee claims that appellant had no right to rescind the contract of purchase because the Underwriters Laboratories, Inc. inspected and labeled the hose prior to shipment from appellee's factory, and because appellant failed to notify appellee of defects in the hose within a reasonable time, and further claims that appellee never consented to a rescission.

Appellee on pages 1 and 2 of its brief cites a number of cases holding that, where a buyer designates a third person to inspect the goods and determines whether or not the goods are of the quality specified in the contract, the buyer is bound by such inspection. This general rule does not apply if the inspection is fraudulent or if the defect in the goods is latent and would not be revealed by such inspection. Appellee, however, overlooks the fact that an inspection in order to be binding must be made when the goods are applied to the contract of sale; in other words, when title passes from the seller to the purchaser. No court has ever held that a buyer is bound to accept merchandise, regardless of its condition *when title is tendered, simply because it was in first class condition* at some time in the past. The cases cited by appellee are cases where the inspection was made at the time of constructive delivery to the purchaser. *Federal Grain Co. v. Hayes Grain & Commission Co.*, 255 S. W. 307, and *Citizens Independent Mill & Elevator Co. v. Perkins*, 152 Pac. 443, involved the sale of grain and *Field v. Descalzi*, 120 Atl. 113, involved the sale of tomatoes, in which grades were specified which were determined by public inspectors when the commodity was delivered to the carriers which is constructive delivery to the purchaser. In *Pacific Commercial Co. v. Greer*, 19 P. 2d 543, a Manila buyer purchased wire rope in San Francisco, and designated one in San Francisco to make the inspection. The contract called for delivery f.o.b. San Francisco. In *Amos v. Walter N. Kelly Co.*, 215 N. W. 397, green lumber was purchased to be shipped in installments. The opinion shows that title passed at the

time of inspection as the purchaser assumed control over it and had it dry kilned at his own expense. In *Gorham v. Dallas C. & S. W. Ry. Co.*, 106 S. W. 930, the commodity was sold f.o.b. In *Herman H. Hettler Lumber Co. v. Olds*, 221 Fed. 612, the court held that delivery was made and title passed at the point of origin.

In this case the contract called for delivery to the fire department at Seattle, Washington. The Underwriters' label was attached at appellee's factory in New Jersey. It is obvious that the purchaser was not bound to accept the hose until it was suitable for the purpose for which purchased when title was tendered.

If we assume that the Underwriters Laboratories, Inc. was acting as the agent of appellant when the inspection was made at appellee's factory, the appellant would not be bound by such inspection unless the defects were such that would have been revealed by such inspection. There were no apparent defects when the hose was received but the fabric in the outer jackets began to break under ordinary handling even before the hose was placed in use. The only objection to the hose was defects in the fabric of the outer jackets which began to appear after receipt of the hose and gradually developed until when the hose was returned all but 13 of the 96 sections were defective. The appellant does not know why the jackets failed. Inspection was made by a representative of the Underwriters Laboratories at Seattle (Tr. 13) and the cause was not determined. Unless the defects are of such a nature as should have been

revealed by the usual inspection a purchaser is not bound by an inspection, either by himself or his agent.

These defects appeared in but this one lot of hose and did not appear in the other lot purchased from appellee (Tr. 19). It is significant that, when this hose was returned to appellee's factory, after appellee had been informed that the fabric of the outer jackets was failing, and was there inspected and a representative of the Underwriters was called in for inspection, no tests were made of the fabric of the outer jackets (Tr. 21). Appellee at its factory had all the facilities for testing hose. If the fabric of the outer jackets was up to standard, it could have been determined, but appellee failed to test the only part of the hose about which the complaint was made but asks the court to conclude that the damage was the result of rough handling by the fire department. It is extremely unlikely that a fire department would select but one lot of hose for rough handling.

Appellee says that appellant failed to notify appellee of the defects in the hose within a reasonable time. The record shows that the first 37 sections were rejected and returned to appellant on May 27, 1952 (Tr. 13), and that appellant notified appellee on May 28, 1952 (Tr. 16). This certainly is not an unreasonable delay.

Complaint is also made that part of the hose remained in the hands of the fire department after the first sections were found defective. There is nothing in the record to show that the fire department knew that the fabric in the outer jackets of other sections was failing until an attempt was made to find out what was wrong

with the 37 sections in September, 1952, when it was decided to inspect the entire lot (Tr. 13). It must be remembered that appellant was the authorized distributor of appellee's hose and was doing everything possible to keep the contract alive; that the City of Seattle did not cancel the purchase contract but simply demanded that the defective hose be replaced; that the fire department retained the hose at appellant's request while appellant was trying to get an answer from appellee (Tr. 16, 17, 19).

Appellee next claims that it did not consent to a rescission of the contract. It relies on the rule that a buyer in rescinding a contract of purchase must act promptly and that if he retains the goods for an unreasonable time without intimating to the seller that he has rejected them, he is bound by the contract. But appellee claims that a different rule applies when a buyer returns the goods to the seller with notice of intention to rescind the purchase and that a receipt and retention of the goods by the seller, without an affirmance or disaffirmance of the rescission does not amount to a consent to the rescission. Appellee cites *Jackson v. Miles F. Bixler Co.*, 127 So. 270, and *J. B. Colt Co. v. Hayenga*, 217 N. W. 187, which it claims supports this novel rule. In the first case merchandise was purchased and paid for and after the purchaser had displayed the goods for some time, he returned them to the seller, without notice and without any claim of right of rescission. The court held that under the circumstances the seller had no more duty to the purchaser than would a stranger to whom the merchandise was sent. In the second case

merchandise was bought on credit and returned to the seller who exercised no dominion over the merchandise other than place it in storage. Prior to its return the seller had refused to rescind the sale contract and after the return an agent of the seller had called upon the buyer to collect the balance of the purchase price. The court held that in the light of all circumstances it could not be inferred that the seller had consented to a rescission but stated that it would have been safer for the seller to have specifically notified the buyer that the merchandise was held for his account.

Appellee, however, argues that appellant was notified that the hose was being held as appellant's property. On page 16 of appellee's brief reference is made to a letter of May 1, 1953, and appellee says:-

"Following its receipt of the May 1 letter, appellant was fully aware that appellee would not return purchase price and that the hose was held as appellant's property."

No letter of May 1, appears in the record and the record affirmatively shows that appellant was not notified that the hose was held as its property. Mr. Hellegers, appellee's claims manager, stated that he held the hose until August, 1953, and then placed in appellee's warehouse as customer's property but that he did not notify appellant (Tr. 21). Appellant's president, Mr. Corbett, says that he never knew what happened to the hose until he learned from Mr. Helleger's testimony on the trial of the case (Tr. 18). Mr. Hellegers also stated that the hose was not held for any purpose of appellant but was held awaiting instructions of appellee's sales department.

Appellee received a return of the hose with full knowledge that it was being returned under a claim of right of rescission of the sale contract. It took possession of the hose and exercised dominion over it for a purpose of its own. It never offered to return it to appellant or notify appellant of its disposition or deny appellant's right to rescind the contract until litigation became eminent.

Respectfully submitted,

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No. 14689

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

THE VITA-FOOD CORPORATION,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S OPENING BRIEF.

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COMMISSIONER OF INTERNAL REVENUE,

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PETITIONER'S OPENING BRIEF.

Jurisdiction.

This proceeding involves determination of federal income, declared value excess-profits, and excess profits taxes for the year of petitioner ended October 31, 1943. [R. 27.] The jurisdiction of this Court is based on sections 1141 and 1142, I.R.C. 1939, as continued in effect by section 7851(b)(1), I.R.C. 1954. The jurisdiction of the Tax Court was based on section 272, I.R.C. 1939.

The notice of deficiency was issued September 16, 1952. [R. 9.] On December 9, 1952, petitioner filed a petition in the Tax Court of the United States. [R. 1.] The Tax Court's decision was entered January 21, 1954. [R. 3.] On January 27, 1954, petitioner filed its petition for review herein. [R. 3.]

Petitioner is a California corporation and has its principal place of business in Los Angeles, California. Petitioner's federal income, declared value excess-profits, and excess profits tax returns for the year involved herein were filed with the Collector of Internal Revenue for the Sixth District of California. [R. 29.]

Questions Presented.

1. Whether the Commissioner erroneously disallowed deduction of \$22,511.03 in respect of compensation paid M. H. Lewis for the year ended October 31, 1942, and \$20,320.00 in respect of compensation paid him for the year ended October 31, 1943. In connection with the amount for the year ended October 31, 1942, there is also the question whether the Tax Court had jurisdiction to make a determination in respect thereto, although such determination was necessary for determination of carrybacks from the year ended October 31, 1944, to the year ended October 31, 1943.
2. Whether the basis for determining gain on the good will and trade-mark sold by petitioner to The Stuart Company on November 28, 1942, included the cost to petitioner of the good will it purchased from Lewis on February 4, 1941.
3. Whether the Commissioner carried his burden of proof in connection with the increase of deficiency requested by him in amended answer based on disallowance of the portion of cost of such good will allowed by him in the deficiency notice.
4. Whether \$75,000.00 out of the total of \$200,000.00 received by petitioner from The Stuart Company under a settlement agreement entered into November 28, 1942,

was capital gain because received for the good will and trade-mark sold under said agreement to The Stuart Company, or ordinary income because paid to petitioner for cancellation of the distributorship contract between petitioner and The Stuart Company.

Statement.

Because of the several issues involved and the fact that much of the argument consists of analysis of the facts, this statement is in the nature of a general outline. The details are filled in, with citation to the record, in the argument under each issue.

Petitioner was organized November 28, 1940, under the laws of California. [R. 29.] One Maxwell H. Lewis was chiefly responsible for its organization. [R. 29.] In 1939 and 1940 he was engaged in certain nutritional studies, and thereafter he decided to go into the business of manufacturing vitamins. [R. 29-30.] He began operation as an individual during the summer of 1940. [R. 30.] During October or November, 1940, and prior to the formation of petitioner, he entered into negotiations with one Arthur Hanisch, a multimillionaire, and reached a general understanding for exclusive distribution by him. [R. 31-33.] Pending completion of details petitioner was formed, on November 28, 1940 [R. 33-34], for the purpose of taking over Lewis's end, the manufacturing end, of this deal with Hanisch. [R. 103-105.]

The arrangement between Lewis and Hanisch was first put into written form on February 4, 1941. [R. 34-35.] Lewis did this in the name of petitioner instead of in his own [R. 34] in order to transfer the deal to

petitioner. [R. 103-105.] On the same date stock was first issued by petitioner [R. 36], and on that date also Lewis sold to petitioner, for a specified price, non-exclusive manufacturing rights in the formulas and products he had developed [R. 44-45], together with all of the good will attached to such products and acquired by Lewis in connection with them. [R. 44-45.] All of these things which occurred on February 4, 1941, including the deal with Hanisch and the transfer of rights and good will to petitioner, were a single "package." [R. 103-105.]

Subsequently the tradename "The Stuart Formula" became attached to the product sold by petitioner, that product being sold to a corporation organized by Hanisch for the purpose, The Stuart Company. [R. 112.] The Stuart Company in turn sold the product to drug stores, hospitals, et cetera. [R. 47-48, 95-97.] On May 5, 1941, the deal with Hanisch was restated and elaborated in a comprehensive written agreement with Hanisch and The Stuart Company. [R. 35, 55.] Pursuant to that agreement with Hanisch and The Stuart Company all trade names were and remained the property of petitioner. [R. 47.]

Conflicts later arose between Lewis and Hanisch. Hanisch, in particular, wanted a stock interest in petitioner, but Lewis refused. [R. 59-60.] The conflicts were resolved by a sale by petitioner to The Stuart Company, on November 28, 1942, of petitioner's good will and its trade-mark, "The Stuart Formula." [R. 48, 110-111.] The total consideration paid petitioner was \$200,000.00. [R. 69.] Petitioner had paid Lewis for the good will transferred to it on February 4, 1941, the sum of

\$78,200.95. [R. 45.] Additional charges brought the basis of that asset up to \$78,350.95. [R. 48.]

Lewis was vice-president, treasurer and managing director of petitioner with authority to exercise all the powers of president. [R. 37.] He was also sales manager. [R. 37.] He directed all of petitioner's activities, working an average of 12 hours per day. [R. 98.] He received compensation of \$42,511.03 for the year ended October 31, 1942, and \$39,783.03 for the year ended October 31, 1943. [R. 40.] As redetermined by the Tax Court petitioner, during its first three years, the years ended October 31, 1941, 1942 and 1943, accumulated net earnings of \$66,523.87, after all charges, including Lewis's actual compensation and all federal taxes, an average of 66% per year on its maximum invested capital of \$33,152.00. [R. 80-81.]

The Commissioner disallowed deduction of \$22,511.03 of the compensation paid Lewis for the year ended October 31, 1942, and \$20,320.00 of the compensation paid him for the year ended October 31, 1943. [R. 40, 12.] The Commissioner disallowed three-fourths of the cost of the good will purchased by petitioner, in determining the basis of the good will and trade-mark sold to The Stuart Company. In the Tax Court, at the time of trial, the Commissioner contended that the other one-fourth should also be disallowed, contending that the items sold The Stuart Company had no cost at all. [R. 25, 49.] The Commissioner also treated \$75,000.00 out of the \$200,000.00 received by petitioner for the good will and trade-mark as ordinary income, contending that that amount was paid for settlement of the contract between

petitioner and The Stuart Company. [R. 15.] Petitioner had reported the entire gain as capital gain. [R. 15.]

The Tax Court sustained the salary disallowance for the year ended October 31, 1943. It made no finding as to what reasonable compensation was for that year, but based its decision solely on the ground that it was "unable to find that the respondent erred." [R. 44.] It made no determination in respect to the compensation for the year ended October 31, 1942, holding that, the Commissioner having asserted no deficiency for that year, it had no jurisdiction [R. 41-42]—this despite that (1) the deficiency notice showed a net operating loss carry-back from the year ended October 31, 1944 [R. 13], (2) the deficiency notice also showed an unused excess profits credit carry-back from the same year to the year ended October 31, 1943 [R. 18-19], and (3) because of the two-year carry-back provisions the net income and excess profits net income for the year ended October 31, 1942, had to be determined in order to determine the carry-backs from the year ended October 31, 1944, available for deduction in the year ended October 31, 1943.

As to the basis of the trade-mark and good will sold to The Stuart Company, the Tax Court also sustained the Commissioner. [R. 53.] The Tax Court further sustained the Commissioner in his treatment of the amount of \$75,000.00, out of the consideration received on sale of the trade-mark and good will, as ordinary income instead of capital gain. [R. 73.]

Petitioner contends that the Tax Court erred in all of these respects.

Specifications of Error.

Petitioner specifies the following errors of the Tax Court:

1. The holding that it did not have jurisdiction to determine the amount allowable as a deduction for the year ended October 31, 1942, in respect of compensation paid M. H. Lewis in that year.
2. The failure of the Tax Court to determine that the Commissioner erred in disallowing the sum of \$22,511.03, in respect of compensation paid M. H. Lewis in the year ended October 31, 1942.
3. The failure of the Tax Court to find that the Commissioner erred in disallowing the sum of \$20,320.00 as a deduction for the year ended October 31, 1943, in respect of compensation paid M. H. Lewis in that year.
4. The failure to hold that the cost of the good will and trade-mark sold to The Stuart Company on November 28, 1942, was \$78,340.95.
5. In respect of the one-fourth of said sum, or \$19,585.24, allowed by the Commissioner in his deficiency notice, and thereafter asked by him, by amended answer, to be disallowed, the failure to hold that the Commissioner did not carry his burden of proof.
6. The failure to hold that no part of the \$200,000.00 received by petitioner from The Stuart Company under an agreement dated November 28, 1942, was ordinary income instead of capital gain.

Summary of Argument.

I.

In order to determine the taxes for the year ended October 31, 1943, it is necessary, because of carry-backs from the year ended October 31, 1944, to make a determination of the net income for the year ended October 31, 1942, as the Tax Court did in its decision. The Tax Court had express statutory jurisdiction to make this determination and therefore also had jurisdiction to determine the amount allowable as a deduction for salary of M. H. Lewis for that year.

The compensation paid Lewis and deducted by petitioner did not exceed a reasonable allowance for the services rendered by him. No services performed by Lewis after 1942 were involved in the amounts disallowed by the Commissioner and the considerable evidence of services rendered in the years 1941 and 1942, as found by the Tax Court, was wholly uncontradicted and cannot be ignored by the Tax Court. Furthermore, the Commissioner's determination in respect of the compensation paid Lewis is inconsistent with the totality of his determination in respect to net income. Therefore no presumption of correctness attaches to his determination.

To the contrary, the amounts of compensation paid here are presumptively reasonable; they were voted by the Board of Directors at the beginning of each year before the profits were known, and the bulk of the compensation was contingent. Further, the qualifications of Lewis, the actual services he rendered, the results accomplished by him in terms of earnings of petitioner, all sustain the compensation paid. There is no support in the record for the suggestion that Lewis was not re-

quired to devote his full time to the business after January 1, 1943. As to the item of \$7,820.00 paid Lewis as commission, the record does show special services rendered in connection with the sale of the trade-mark, "The Stuart Formula," supporting the reasonableness of the payment.

II.

In order to determine the amount of taxable proceeds of the sale of good will and trade-mark to The Stuart Company by petitioner, there must be deducted the cost to petitioner of the good will which it acquired from Lewis on February 4, 1941. This good will did in fact exist. It consisted of the acceptance of the product by hospitals and physicians and by a distributor, Hanisch, who had already undertaken its nationwide distribution and paid in advance for a large initial order. It is clear also as a matter of law that the existence of good will on February 4, 1941, was not dependent upon the existence of profits prior thereto.

When Lewis transferred the good will to petitioner, he also transferred the business with which it was connected, the manufacturing and formula rights in products he had developed, and the business deal with Hanisch. This good will attached itself to and became a part of the trade-mark, "The Stuart Formula." When the trade-mark was sold to The Stuart Company, the good will Lewis sold to petitioner passed with it, necessarily and also by express assignment.

The trade-mark "The Stuart Formula," derived its original value from the good will which Lewis conveyed to petitioner, and the development of this good will by The Stuart Company was by a distributor acting as such and therefore belonged to the manufacturer.

Since only the excess of the amount realized over the cost is gain, which alone may be taxed, the cost of the good will to petitioner must be deducted in arriving at the amount to be included in gross income in respect of the sale by petitioner of good will and trade-mark to The Stuart Company.

III.

In no event should the portion of the good will cost allowed in the deficiency notice have been disallowed by the Tax Court, because the Commissioner failed to carry his burden of proof, as required by the Rules of Practice. In fact there was no finding at all that the good will and trade-mark had no cost or other basis.

IV.

The entire amount of \$200,000.00 received by petitioner under the settlement agreement of November 28, 1942, with The Stuart Company represented the proceeds of sale of good will and trade-mark. That sum, to the extent of the excess over cost, was capital gain, because it was paid for a capital asset; no part of it was ordinary income.

The contract of May 5, 1941, under which petitioner granted to The Stuart Company exclusive distributorship of the product sold under the name of "The Stuart Formula," was cancelled by notice served by petitioner on October 8, 1942, accepted by Stuart on October 12, 1942, and ratified by petitioner's Board of Directors on October 23, 1942. Petitioner sought and obtained a temporary restraining order against use of the trade-mark, "The Stuart Formula," by The Stuart Company, in litigation filed on November 25, 1942. This litigation was settled by transfer for consideration of the trade-mark

and good will from petitioner to The Stuart Company. The consideration was not for cancellation of the contract which was no longer extant.

In any case, when The Stuart Company, the exclusive distributor, acquired from the manufacturer the trade-mark under which the product was sold, and the good will of the business, the distributorship was merged with the trade-mark and ceased to exist. Under the cases the entire sum so received for the sale of the good will and trade-mark represents the proceeds of sale of a capital asset.

ARGUMENT.

I.

The Tax Court Erred in Failing to Allow Deduction of the Amounts Disallowed by the Commissioner, in Respect of Compensation Paid by Petitioner to M. H. Lewis in the Years Ended October 31, 1942 and October 31, 1943.

A. The Tax Court Had Jurisdiction of the Issue of Deduction for the Year Ended October 31, 1942, Relating to Compensation Paid M. H. Lewis in That Year.

Section 272(g) of I. R. C. 1939 (App. herein, p. 2) expressly gives the Tax Court jurisdiction to determine facts with relation to any year where such determination is necessary to a determination of the taxes for the taxable year involved. The taxable year involved here, that is, the year for which a deficiency was determined by the Commissioner, is the year ended October 31, 1943. If then in order to determine the taxes here for the year ended October 31, 1943, it is necessary to make a determination of the net income for the year ended October 31, 1942, then the Tax Court had jurisdiction to de-

What is more, the Tax Court, in its very decision herein in respect of taxes for the year ended October 31, 1943, took into account the net income for the year ended October 31, 1942, the thing which it said it could not do. The above figure of \$3,983.96 for "Adjusted excess profits net income for the year ended 10/31/42" appears in the recomputation of tax for the purpose of that decision, specifically in arriving at the balance of excess profits credit carry-back "available as carryback to year ended 10/31/43." [R. 79.] Thus even the Tax Court in its very decision denying jurisdiction over the year ended October 31, 1942, was compelled to take the net income for that year into consideration in determining the taxes for the year ended October 31, 1943.

It must follow that the Tax Court had jurisdiction to determine the net income for the year ended October 31, 1942, and therefore to determine the amount allowable as a deduction for salary of M. H. Lewis for that year.

B. Of the Compensation Paid M. H. Lewis in the Year Ended October 31, 1943, Only Compensation for Services Rendered Prior to 1943 Is Involved in This Proceeding.

The Tax Court's findings show four separate items of compensation paid M. H. Lewis in the year ended October 31, 1943. The first two of those items, "Base salary" in the amount of \$7,200.00 and "Commission" in the amount of \$12,263.03 [R. 40], or a total of \$19,463.03, were allowed by the Commissioner. [R. 41.] Only the remaining two items, labeled "Income Taxes" in the amount of \$12,500.00 and "Additional" in the sum of \$7,820.00 [R. 40], or a total of \$20,320.00, were disallowed. [R. 41.]

As to the first of those items, \$12,500.00, the fact that it was in form of reimbursement of income taxes is, of course, immaterial. Payment of employees' income taxes is treated for tax purposes just like other forms of compensation. (*Old Colony Trust Co. et al. v. Commissioner*, 279 U. S. 716 (1929); *Levey v. Helvering* (C. A., D. C.), 68 F. 2d 401 (1933); *Mary Sachs v. Commissioner*, 11 T. C. M. 882, 889 (1952).)

That item of \$12,500.00 was paid Mr. Lewis, under the compensation formula approved by the directors, in respect of 1942. [R. 112.] A similar item, in the amount of \$8,075.26, had been paid him in petitioner's year ended October 31, 1942 [R. 40], in respect of 1941. [R. 111-112.] The latter item had been included by him in his 1941 return, and the \$12,500.00 item for 1942 was included by him in his 1942 return. [R. 111-112.] No such allowance was made after the calendar year 1942. [R. 112.] The item of \$12,500.00 for 1942 had no relation to any period after that year except for the fact that petitioner was on a fiscal year basis, with a year ending October 31, so that the amount was accrued and deducted by petitioner in its fiscal year ended October 31, 1943.

The same fact is true of the item of \$7,820.00. As the findings show, that amount was paid to Mr. Lewis as a commission on the sale of "the Stuart Formula" trademark. [R. 40.] That sale took place November 28, 1942. [R. 48.] Thus the item of \$7,820.00 was compensation for services rendered in 1942. No services after that year were involved.

C. The Tax Court Has Indicated That a Proper Showing Was Made in Respect of Lewis's Services Prior to 1943, So That Deduction for the Compensation Paid Him for Periods Prior to 1943 Should Have Been Allowed.

The Tax Court states in its opinion that "petitioner submitted considerable evidence as to the services performed by Lewis for the fiscal years 1941 and 1942 and the amount of time devoted by him to the petitioner's business in those years." [R. 42.] What the Tax Court meant was the *years* 1941 and 1942, not the *fiscal years* 1941 and 1942. The evidence that was introduced as to the services performed by Lewis and the time put in by him covered the *years* 1941 and 1942, and not any *fiscal years*. [R. 98, 99.] Of course, since as shown under "B" above no services after 1942 were involved in the amounts disallowed by the Commissioner, no evidence in respect of services after 1942 was necessary.

The Tax Court was right in pointing to the "considerable evidence" of services rendered and time put in. It is not the title of the office held but the actual services rendered which govern. *Smokey Mountains Beverage Company v. Commissioner*, 22 T. C. No. 156 (1954), where the court stated:

"But section 23(a)(1)(A) provides for the deduction of compensation paid for personal services actually rendered. It contains no requirement that the services performed coincide with the general understanding of the duties of the office held."

To the same effect:

Amco Investment Co. v. Commissioner, 4 T. C. M. 307, 309;

4 Mertens, Law of Federal Income Taxation, Par. 25.53.

The "considerable evidence" of services rendered and time put in referred to by the Tax Court was wholly uncontradicted. Nor was any countervailing evidence introduced by respondent based upon a showing of the services rendered and time put in by any other person. In that respect the record made by petitioner is completely unchallenged. In *Loesch & Green Construction Co. v. Commissioner* (C. A. 6), 211 F. 2d 210 (1954), the court, quoting cases decided by Courts of Appeals of the 5th, 6th and 10th Circuits, held that where evidence introduced by the taxpayer on the reasonableness of salaries is "unimpeached, competent, relevant and uncontradicted," the taxpayer's burden is met and, further, that the "Tax Court cannot reject or ignore this evidence and determine the propriety of the amount of salaries paid upon its own innate conception of reasonableness." The deduction here for compensation paid Lewis for services prior to 1943 should therefore have been allowed.

D. The Compensation Paid Lewis in the Years Involved Herein and Deducted by Petitioner Did Not Exceed a Reasonable Allowance for Services Rendered by Him.

(a) Statutory Provision and Amounts of Compensation Involved.

The statute, I. R. C. 1939, Section 23(a)(1)(A), (App. herein, p. 1), provides for deduction of a "reasonable allowance for salaries or other compensation for personal services actually rendered."

The compensation involved here is that paid in the taxable years ended October 31, 1942, and October 31, 1943, to M. H. Lewis, petitioner's executive vice-president, treasurer, managing director, sales manager, and only officer during those years on a full-time basis. The

totals paid officers in those two years were \$49,861.03 and \$45,783.03, respectively, and of those amounts the amounts paid Lewis were \$42,511.03 and \$39,783.03, respectively. For the earlier year the Commissioner reduced the deduction for compensation paid Lewis to \$20,000.00, disallowing the remainder of \$22,511.03; and for the later year he reduced the deduction to \$19,463.03, disallowing the remainder of \$20,320.00. [R. 40, 12.] As shown under "B" above, the amount disallowed for the later year consists of two items paid in respect of services rendered by Lewis during the calendar year 1942, so that the disallowance for the taxable year ended October 31, 1943, as for the taxable year ended October 31, 1942, relates to services rendered prior to January 1, 1943.

(b) *The Rule Which Ordinarily Invests the Commissioner's Determination With a Presumption of Correctness Does Not Apply in This Case, Because That Determination Was Itself Inconsistent; in Fact, the Very Opposite Is True Here—the Amounts of Compensation Involved Here Are Presumptively Reasonable, Because They Were Voted by Petitioner's Directors, and at the Beginning of Each Year.*

The record is devoid of any indication of the basis upon which the Commissioner determined that the amount which he allowed was reasonable. In fact, the Commissioner's determination on that issue is inconsistent with the totality of his determination in respect to net income. Thus, for the year ended October 31, 1943, the Commissioner cut the allowance for salary paid Mr. Lewis and yet increased net income to \$125,437.48 [R. 15], which, after allowing for taxes of \$50,068.34 on the

increased net income,* leaves net earnings of \$75,369.14, a return of 227% on stockholders' investment of \$33,152.00. [R. 36.] That the percentage of earnings on stockholders' capital is a basic factor in determining reasonableness of salaries will be shown more fully below. The point here is that there is an inconsistency on the face of the deficiency letter in reducing, without explanation, the salary of petitioner's principal officer and at the same time asserting a net income which results in earnings, after taxes, of 227% on stockholders' investment.

"In tax cases the burden of proof is measured by the deficiency letter." (*Lenox Clothes Shops, Inc. v. Comm.* (C. A. 6), 139 F. 2d 56 (1943).) The deficiency letter is the Commissioner's determination (I. R. C. 1939, Sec. 272(a)(1)); and where that determination is itself inconsistent, it cannot be given effect. (*Gasper v. Commissioner* (C. A. 6), F. 2d (July 6, 1955).) Therefore no presumption of correctness attaches to the Commissioner's determination in this case.

Here, indeed, the very opposite is the situation. The salaries here were voted by the directors, and at the beginning of each year, before the year's profits were known. [R. 99, 37.] Action of the directors, at any time, creates a presumption of reasonableness. In *Ox Fibre Brush Co. v. Blair* (C. A. 4), 32 F. 2d 42 (1929), affirmed 281 U. S. 115, 50 S. Ct. 273 (1930), the Court of Appeals for the Fourth Circuit stated, at page 45:

"The action of the board of directors of a corporation in voting salaries for any given period is en-

*\$40,821.03 [R. 11] being the total tax on net income of \$115,162.69 [R. 15], plus 90% of \$10,274.79 [R. 15], or a total of \$50,068.34.

for the services for which he was paid. That point is supported by a long list of cases. Mertens, Volume 4, Paragraph 25.52, cites 56 such cases.

Judged from the standpoint of that factor Lewis stands high. He was eminently qualified for the services which he rendered. In 1940, when petitioner was formed, he was 43 years of age. [R. 117.] He had held executive positions in government fields involving health and nutrition, with the expenditure of 10 million dollars a month of state and federal funds under his supervision, and with a staff numbering from 60 to 1,800 under his immediate direction and supervision. [R. 100-101, 118-120.] Dr. Henry Borsook, an authority in the field of nutrition [R. 29], regarded Lewis so highly that he would trust no one else with the marketing of vitamins upon which he could place his stamp of approval. [R. 33.] Mr. Hanisch, respondent's witness, also agreed that Mr. Lewis was very able. [R. 161.] It must be borne in mind also in this connection that Mr. Lewis not only produced multiple vitamins—he pioneered the multiple vitamin industry. The Tax Court here itself found as facts:

“About the middle of 1940, after completing his work with Dr. Borsook on the analysis of the nutritional requirements of the nation, Lewis went into the vitamin business. At that time vitamins were being sold individually and at high prices. Lewis' purpose, through the use of Dr. Borsook's formulas and standards as bases, was to produce a single mixed product containing in each dose all the known vitamin and mineral requirements for the human body which would sell at approximately one-tenth of the total of the then current prices for individual vitamins. *In this he succeeded.*” [R. 29-30.] (Italics added.)

- (e) *The Actual Services Rendered by Lewis and the Time Put in by Him Show His Compensation to Be Reasonable.*

A further basic factor is Lewis's services—not just his title or his formal designation, but his actual responsibility and his actual work. Here also, the cases are legion. Indeed, without a showing of the actual duties performed and time put in by the officer involved a court could make no determination of reasonableness. 4 Mertens Par. 25.53 (citing, n. 6, 71 separate cases).

The Tax Court states that the evidence introduced by petitioner on this issue was “considerable.” [R. 42.] It was, indeed, considerable. Mr. Lewis put in an average of 12 hours a day. [R. 98.] He directed all of petitioner's activities, including its manufacturing. He purchased all of its supplies, hired its employees and took care of its financing. [R. 98.] He prepared telephone sales talks [R. 108], and the content and technical presentation of all of its advertising material. [R. 107, 127, 161.] In general he directed petitioner's advertising, promotion, and marketing program. [R. 107, 127.] He also served as an officer of The Stuart Company [R. 59], petitioner's sole distributor, without additional compensation. [R. 99.] Clearly he was the heart and substance of petitioner's activities.

- (f) *The Results Accomplished by Lewis for Petitioner, in Terms of Earnings of Petitioner, Sustain the Compensation Paid Him.*

We come next to the question of results. Results can be precisely measured. The end result of business activities is earnings, earnings remaining on shareholders' investment, after deduction of all expenses, including

compensation of officers—and on the basis of such earnings the reasonableness of specific amounts of compensation can be determined.

Here in the period of 10 months ended October 31, 1941, petitioner's very first period, with a capital invested of only \$100.00, petitioner had a net income of \$16,280.00 [R. 40.] According to the Commissioner's computation, and as determined by the Tax Court, during the two years and ten months ended October 31, 1943, with capital invested \$33,152.00 at its highest point [R. 36, 80], and after all deductions, *including the disallowed salaries, and all income and excess profits taxes as computed after such disallowance*, a surplus of \$62,523.87 was accumulated [R. 81], or 66% per year on maximum shareholders' capital. Highlighting this very point the Tax Court here states, in connection with another issue, that

“petitioner, with only a comparatively small capital, was, and had been, operating at a profit after payment to its managing officer of compensation of approximately \$40,000 a year.” [R. 71.]

This was an amazing accomplishment for a new corporation. The development period of a business is normally associated with losses, not profits. As the regulations issued under the relief provisions of the World War II excess profit tax law state (Regulations 112, Sec. 722-3(d)):

“Generally, business experiences a time lag between the time that new operations are commenced, reflecting either the starting of a new business or a business essentially different in character from an old business, and the attainment of a normal earning level.”

To the same effect, Journal of the American Statistical Association, December, 1954, Page 847, Paragraph 9d, where it is stated:

“Business mortality. It is fairly well established that with most types of business the early years are the most difficult. It is then that mortality is highest. The longer a business survives, generally, other things being equal, the smaller becomes the probability of failure.”

Even after they have passed the development stage businesses do not often reach the level of profit that was accomplished here at the very beginning. In numerous cases decided by the Tax Court itself in which the officers whose salaries were involved held 85% or more of the stock, and in which earnings left as a percentage of capital stock were the primary factor in sustaining the reasonableness of such salaries, those percentages were as low as 8% but never as high as 66%. See: *National Alloys Co.*, 7 T. C. M. 962 (1948); *Schaberg-Dietrich Hardware Co.*, 6 T. C. M. 269 (1947); *Charles Schwartz & Co.*, 4 T. C. M. 841 (1945); *Benz Brothers Co.*, 20 BTA 1214 (1930); *Woodruff Lumber Co.*, 6 BTA 515 (1927); *Law and Credit Co.*, 5 BTA 57 (1926).

In *Lucas v. Ox Fiber Brush Co.*, 281 U. S. 115, 50 S. Ct. 273 (1930), the Supreme Court took note of that point as follows:

“The net income in 1920, after a deduction of all expenses, including officers’ salaries, represented a return of 21.13 per cent on invested capital of about \$750,000, as determined by the Commissioner of Internal Revenue.”

It is clear here that Lewis accomplished phenomenal results, in terms of earnings of petitioner, after all deductions, including his compensation and also federal taxes, and on that basis alone the compensation paid him was reasonable.

(g) *The Tax Court Misstates the Record in Suggesting That Lewis Was Relieved of Any Time or Duties During 1943.*

The Tax Court here says that during the period January 1 to December 31, 1943, there was "nothing to indicate that Lewis was not to continue free to engage in such personal activities as he wished and was to receive the agreed compensation so long as he devoted only 'a substantial portion' of his time to the affairs of the petitioner." [R. 43.] The point is not important since, as shown above, pages 14, 15, Lewis's compensation for any period after 1942 is not involved in this proceeding. Nevertheless, it may be observed that this statement of the court below is wholly without support in the record. The board resolution to which the Tax Court refers [R. 39] placed Lewis on the same basis verbatim as he had been in 1941, and the first half of 1942, when he was on a full-time basis and actually put in an average of 12 hours a day. The suggestion that he was not required to devote his full time after January 1, 1943, has no foundation in the record.

(h) *The Reasonableness of the Item of \$7,820.00 Paid Lewis Is Sustained by the Record.*

In respect of the item of \$7,820.00 paid Lewis, pursuant to action of petitioner's board of directors, as commission in connection with the sale of the trade-mark "The Stuart Formula," the Tax Court states that the record failed to disclose that under its agreement with Lewis, petitioner was under any obligation to make such payment. [R. 43-44.] No prior obligation is required, however, to support a deduction for additional compensation paid. (*Lucas v. Ox Fibre Brush Co., supra.*) The Tax Court here further says that "the reasons prompting the directors to authorize such payment are not disclosed." But the record does show the special services rendered by Lewis in connection with the sale of the trade-mark "The Stuart Formula." [R. 112-116, 133.] The sale price was \$200,000.00. [R. 69.] Certainly here is a clear case of the inference of reasonableness, pointed out above, that attaches to authorization by the taxpayer's board of directors. (*Ox Fibre Brush Co. v. Blair, supra.*) There is no justification whatever for the Tax Court's position in regard to that item.

Against this background of fact and law the action of the Commissioner in disallowing a portion of the compensation paid Mr. Lewis was highly arbitrary. The record is wholly wanting in any justification for his action. We submit that the amounts paid Mr. Lewis should have been allowed in full.

II.

The Cost to Petitioner of the Good Will Which It Acquired From Lewis Must Be Deducted in Arriving at the Amount Taxable in Respect of the Sale of Good Will and Trade-mark to the Stuart Company.

A. The Good Will Which Lewis Conveyed to Petitioner on February 4, 1941, Did in Fact Exist.

As the Tax Court summarizes petitioner's description of that good will, it consisted of

"Lewis's contacts with the California Institute of Technology and Dr. Borsook. their approval of the product he had developed and his price determinations and marketing practices; the approval and acceptance by hospitals and physicians of his product, though only in the form of test samples bearing no name but only numbers; and his contact with Hanisch and the latter's approval of the venture and his readiness to market the products." [R. 50.]

This description of the good will is fully supported by the record. [R. 29-35, 106-107.] As the Tax Court also stated, petitioner urged there that the good will so described became inseparably attached to the trade-mark "The Stuart Formula" and "the two became fused into a single property." [R. 50.] That fact, too, is fully supported by the record. [R. 95-96, 112, 145-146.] There is nowhere any suggestion of a finding to the contrary.

The good will so described was good will.

"If a business is made valuable by the skill and attention of its creator the good will thus created is recognized by the law as property belonging to the founder and if, in connection with the business, he

adopts and publicly uses a trade-mark, he has a remedy either at law or in equity against those who undertake to use it without his permission."

American Dirigold Corporation v. Dirigold Metals Corporation (C. A. 6), 125 F. 2d 446, 452 (1942).

The Tax Court, however, in its opinion, and without any finding to that effect, takes the position that no good will existed in Lewis's vitamin business at the time he made the transfer of that good will to petitioner. [R. 52.]

As showing that no good will did in fact exist here, the Tax Court says first that the name "Buoyant B" was not acquired by petitioner and that therefore it parted with nothing when it agreed to discontinue that name "in order to obtain the agreement of May 7, 1941." [R. 51-52.] True, it did not acquire the name "Buoyant B," but that was because, as the Tax Court itself found, the discontinuance of "Buoyant B" was agreed upon between Lewis and Hanisch before petitioner was even formed. [R. 33-34.]

As a second point showing that no good will in fact existed, the Tax Court notes that Lewis realized no profits from his vitamin business prior to the transfer of good will to petitioner on February 4, 1941. [R. 52.] That point, to begin with, does not correctly reflect the law. In *Commissioner of Corporations and Taxation v. Ford Motor Company*, 308 Mass. 558, 33 N. E. 2d 318, 139 A. L. R. 936 (1941), the Supreme Court of Massachusetts stated, 139 A. L. R. at page 949:

"A Corporation may have a valuable good will even though the business may have been conducted

at a loss during certain years, *Barden Cream & Milk Co. v. Mooney*, 305 Mass. 545, 26 N. E. (2d) 324; *Rookwood Pottery Co. v. Commissioner of Internal Revenue*, 6 Cir, 45 F. (2d) 43, 45; *Securities Realization Co. v. Peabody & Co.*, 300 Ill. App. 156, 20 N. E. (2d) 874; *Appeal of C. F. Hovey Co.*, 4 B. T. A. 175, 177, . . .”

In the *Rookwood* case cited in the foregoing quotation, the Court of Appeals for the Sixth Circuit stated, at page 45:

“The decision of the board assumes that there could have been no good will if there had been no net profits. This is clearly wrong; many an enterprise has been, by its good will, sustained and carried through a non-profit period.”

In *Macfadden v. Jenkins*, 40 N. D. 422, 169 N. W. 151, 156 (1918), it was held that good will may have a value although there have been no past profits. The distinction between “profits” and “good will” was shown in the case of *Nelson v. Hiatt*, 38 Neb. 478, 56 N. W. 1029, 1032 (1893), wherein the Court said:

“The distinction between the two [profits and good will] is obvious. Profits are the gains realized from trade; good will is that which brings trade. A favorable location of a mercantile establishment, or the habit of customers to resort to a particular locality, will bring trade. This advantage may be designated by the term ‘good will.’ What the trader gains from the trade so acquired are ‘profits.’”

The Tax Court here was also wrong as to the facts. On February 4, 1941, when the good will was transferred to petitioner, a basis for profits had already been laid and

on that very date it was already bearing fruit. What is referred to is the contract whereby Hanisch, a multi-millionaire [R. 31], agreed to undertake a nationwide distribution of Lewis's vitamin products, an agreement which had, prior to the formation of petitioner on November 28, 1940, reached the stage of "a general understanding as to terms and conditions" [R. 33], and which, by February 3, 1941, had resulted in a first order from Hanisch with a check from him for \$23,510.40. [R. 34.] That first order and check were accepted February 3, 1941, by a letter summarizing the detailed agreement which had been reached between Lewis and Hanisch for the distribution of Lewis's vitamin products. [R. 34-35.] Lewis wrote that letter in petitioner's name instead of in his own in order to transfer his deal with Hanisch to petitioner. [R. 103-105.] On February 4, 1941, Hanisch replied to petitioner confirming the summarization contained in petitioner's letter of February 3, 1941, as representing the agreement arrived at between Lewis and Hanisch through their discussions. [R. 35.]

The good will which Lewis transferred to petitioner on February 4, 1941, was intended to and did include this customer relationship of Hanisch to petitioner [R. 103-105, 106-107], and it was out of this relationship that petitioner's profits were derived and it was as a result of this relationship that petitioner was able to develop the trade-mark "The Stuart Formula" and to sell it for \$200,000.00. This good will, moreover, was not a mere product of Lewis's personal efforts alone. In developing it he expended, in cash, the sum of \$8,200.95, and that was the cash cost of that good will to him. [R. 130.]

As it was stated by Mr. Justice Cardozo in *In re Brown's Will*, 242 N. Y. 1, 150 N. E. 581, 44 A. L. R. 510, 10A Mertens 71, 86 (1926):

“Men will pay for any privilege that gives a reasonable expectancy of preference in the race of competition. Cf. *Walton Walter Co. v. Village of Walton*, 143 N. E. 786, 238 N. Y. 46, 50. Such expectancy may come from succession in place or name or otherwise to a business that has won the favor of its customers. It is then known as good will.”

In the case at bar there was acceptance of the product by hospitals and physicians, and by a distributor who was ready and able to undertake its nationwide distribution and had, in fact, already undertaken it and paid in advance for a large initial order. [R. 45-46, 50.] That the good will for which petitioner paid existed is clear.

B. The Good Will Was Not Sold by Lewis to Petitioner Separately From the Business With Which It Was Connected.

The Tax Court next challenges Lewis' transfer of good will to petitioner on the ground that good will cannot be carved out of a business and sold independently of the going concern. [R. 52-53.] But an examination of the cases cited by the Tax Court on that point show clearly that the “going concern” which must also be transferred is limited to the business with which the good will is connected.

The good will here was not sold separately from the business with which it was connected. There is no finding that it was, and the record otherwise does not show that it was. The contrary is true.

Sales to one King under the label "Buoyant B" were discontinued as a condition of the deal with Hanisch, a condition agreed on before petitioner was formed. [R. 33-34, 50.] Sales under the name "Vitall" were never promoted and fell by the wayside because of trade-mark interferences. [R. 49-50, 108.] The only continuing promotion of the product was by way of the deal with Hanisch. When, on February 4, 1941, Lewis transferred the good will to petitioner, he transferred also manufacturing and formula rights in the products he had developed [R. 44-45], and also that deal with Hanisch, by formalizing the deal in the name of petitioner instead of in his own. [R. 34.] He transferred all this to petitioner as a "package" deal. [R. 103-105, 106-107.]

That "package" was the sum total of his vitamin business at that time, so that when he transferred the good will to petitioner, he also transferred the business with which it was connected. The fact that the parts of this "package" deal were represented by separate documents is of course unimportant; they are still one deal. (*Helvering v. Le Gierse et al.*, 312 U. S. 531, 540-541, 61 S. Ct. 646 (1941).) Lewis even transferred himself to petitioner, for he became petitioner's executive vice-president, treasurer, managing director, and sales manager, working an average of 12 hours per day. [R. 37, 98.] The record fails to show that he reserved even the slightest part of the business to himself or continued any business as an individual. The fact that on February 4, 1941, Lewis's entire vitamin business was tied up with Hanisch does not make it any the less a "going business," as the Tax Court used that term. [R. 53.]

The "package" consisting of the good will and the business with which it was connected, the business tied

up in the deal with Hanisch, was, as the Tax Court found, in existence before petitioner was formed [R. 33]; and petitioner was formed for the very purpose of taking it over. [R. 103-105.] The good will was not carved out and sold to petitioner separately; it was sold to petitioner with the business with which it was connected.

C. The Good Will Which Lewis Conveyed to Petitioner, as a Matter of Fact, and Necessarily as a Matter of Law, Passed to The Stuart Company With the Trade-mark "The Stuart Formula" to Which It Had Become Attached.

The good will which Lewis conveyed to petitioner attached itself to and became a part of the trade-mark "The Stuart Formula." The record shows this as a fact. [R. 112.] It is also a matter of law. In *Coca-Cola Bottling Co. v. Coca-Cola Co.*, 269 Fed. 796 (D. C. Del., 1920), the court, citing Hopkins on Trade-Marks (3rd Ed.), page 227, and Nims on Unfair Competition (2nd Ed.), Section 15, stated:

"Trade-marks and the good will of a business are inseparable. In fact, a trade-mark is merely one of the visible mediums by which the good will is identified, bought, and sold, and known to the public."

Indeed, a trade-mark has no existence as property without the good will of the business in connection with which it is used. It cannot be sold without it. (*E. F. Prichard Co. v. Consumers Brewing Co.* (C. A. 6), 136 F. 2d 512, cert. den. 321 U. S. 763 (1944); *Walgreen Drug Stores v. Obear Nester Glass Co.* (C. A. 8), 113 F. 2d

956, cert. den. 311 U. S. 708, 311 U. S. 730 (1940); *Esso, Inc. v. Standard Oil Co.* (C. A. 8), 98 F. 2d 1 (1938); *U. S. Ozone Co. v. U. S. Ozone Co. of America* (C. A. 7), 62 F. 2d 881 (1932); *Joseph Schlitz Brewing Co. v. Houston Ice & Brewing Co.* (C. A. 5), 241 Fed. 817, aff'd 250 U. S. 28 (1919).) It is clear that, regardless of any intention of the parties, the good will which Lewis sold to petitioner became fused into the trade-mark "The Stuart Formula" and passed with it when that trade-mark was sold to The Stuart Company.

The fact is equally clear that what was expressly sold by petitioner to The Stuart Company was the trade-mark *and* good will. Under the contract of November 28, 1942, the trade-mark was transferred and petitioner required to execute "appropriate assignments," if requested. [R. 65.] Subsequently The Stuart Company requested the execution of an assignment, enclosing a form for that purpose [R. 110], and pursuant thereto petitioner assigned to The Stuart Company the trade-mark "The Stuart Formula" and the "good will of the business directly connected with the use of said trade-mark." [R. 110-111.]

There can be no doubt, therefore, that what was sold by petitioner to The Stuart Company under the agreement of November 28, 1942, included the good will connected with the products Lewis had developed, and that of necessity included the good will, connected with those products, which Lewis transferred to petitioner on February 4, 1941.

D. The Trade-mark "The Stuart Formula" Did Not Acquire Its Value Entirely From the Promotion and Sale of the Product by The Stuart Company; The Stuart Company Only Helped to Develop the Good Will Which Lewis Had Conveyed to Petitioner, and Petitioner's Ownership of That Good Will Was Not Affected by Such Development.

The Tax Court states in its opinion that the trade-mark "The Stuart Formula" acquired its value from the promotion and sale of the product under that name by The Stuart Company. [R. 53.] There is no finding or other part of the record to support that proposition. True, all of the advertising was paid for by Stuart. But Lewis, petitioner's executive vice-president, served also as an officer of Stuart without compensation. [R. 59, 99.] He actually guided and directed the advertising and, in fact, the entire promotion program. [R. 107-108, 157-158, 161.] The mere fact that Stuart paid the advertising bills does not detract from the fact that the trade-mark "The Stuart Formula" derived its life blood from the good will which Lewis had conveyed to petitioner.

Stuart, moreover, represented itself to the trade as distributor only. [R. 96.] If Stuart helped to develop this good will, it was still the good will of petitioner; for the good will which a distributor *acting and representing itself as such* develops belongs to the manufacturer. (*Lawrence-Williams Co. v. Societe Enfants Gombault et cie* (C. A. 6), 22 F. 2d 512 (1927).)

E. The Cost of the Good Will to Petitioner Must Be Deducted in Arriving at the Amount Includable in Gross Income in Respect of the Sale of the Good Will and Trade-mark to The Stuart Company; for Only the Gain Is Subject to Tax.

Good will is itself a capital asset. (*Ensley Bank & Trust Co. v. United States* (C. A. 5), 154 F. 2d 968, cert. den. 329 U. S. 732 (1946).) The cost to petitioner of the good will which it sold with the trade-mark to The Stuart Company is shown by the findings. [R. 45.] The statute is clear that only the excess of the amount realized over the cost is gain, and that only the gain may be taxed. (I. R. C. 1939, Secs. 111(a), 113(a), 113(b); App. herein, p. 1.)

It is not a question of whether the cost should have been incurred. It was actually incurred and that is enough. Even if it were illegally incurred this would still be true, since the tax is imposed only on the gain, not on the gross receipts. *Hofferbert v. Anderson Oldsmobile, Inc.* (C. A. 4), 197 F. 2d 504 (1952), citing several decisions of the Supreme Court, including *Goodrich v. Edwards*, 255 U. S. 527 (1921), where the court stated, at page 535:

"It is thus very plain that the statute imposes the income tax on the proceeds of the sale of personal property to the extent only that *gains* are derived therefrom by the vendor." (Italics in original.)

(To the same effect, *Commissioner v. Weisman et al.* (C. A. 1), 197 F. 2d 221 (1952); *Commissioner v. Guminiski* (C. A. 5), 198 F. 2d 265 (1952); *Jones v. Herber* (C. A. 10), 198 F. 2d 544 (1952).)

It follows of necessity that the cost of the good will to petitioner must be deducted in arriving at the amount to be included in gross income in respect of the sale by petitioner of good will and trade-mark to The Stuart Company.

III.

The Commissioner Failed to Carry His Burden of Proof, Under the Tax Court Rules, in Respect to the Portion of the Good Will Cost Allowed in the Deficiency Notice but Disallowed by the Tax Court Upon Request of the Commissioner in an Amended Answer.

In the deficiency notice the Commissioner allowed one-fourth of the actual cost of the good will, or \$19,585.24. By amended answer he asked the Tax Court to disallow that amount also. [R. 25, 49.] The Tax Court did so. [R. 53.] Under the Rules of Practice Before the Tax Court, Rule 32 (App. herein, p. 2), the burden of proof on an issue so raised is on the Commissioner. There is no finding here showing that the Commissioner carried that burden of proof or any finding showing that the petitioner made that proof for him. There is no finding that the good will and trade-mark had no cost or other basis. Even in the opinion there is no affirmative statement to that effect. The Tax Court's sole approach on this issue is wholly negative, as follows:

“we find nothing to indicate” [R. 51],

“the record fails to show” [R. 52, in two places],

“Nor does the record indicate” [R. 52],

“neither the bill of sale nor other evidence of record indicates.” [R. 52.]

Clearly there must be proof, whether by one party or the other, to sustain a burden of proof. The mere absence of proof cannot do this. (*Roybark et al. v. United States* (C. A. 9), 218 F. 2d 164 (1955).)

It follows that the Tax Court erred in disallowing the amount of \$19,585.24 which the Commissioner had allowed in his deficiency notice as cost of the good will and trade-mark sold to The Stuart Company.

By taking this position petitioner does not suggest that the amount of \$19,585.24, being only one-fourth of the actual amount of \$78,340.95, is the correct amount to be allowed as cost of the good will and trade-mark sold to The Stuart Company. Petitioner's position here is only that in the absence of proof no cost can be disallowed which was allowed in the deficiency notice.

IV.

The Entire Amount Received From the Stuart Company Under the Settlement Agreement of November 28, 1942, Was the Proceeds of the Sale of Good Will and Trade-Mark to That Company; No Part of It Was Ordinary Income.

A. No Part of the Consideration of \$200,000 Received by Petitioner Under the Settlement Agreement of November 28, 1942, Is Allocable to Cancellation of the May 5, 1941 Distributorship Agreement, for the Reason That That Agreement Had Previously Been Cancelled and Was No Longer in Effect.

The question here is whether out of the total of \$200,000.00 petitioner received from The Stuart Company under the contract dated November 28, 1942, the sum of \$75,000.00 was ordinary income or capital gain.

That sum was capital gain if it was paid for property. (I. R. C., Sec. 117(a); App. herein, p. 2.) The Tax Court states that it was ordinary income instead because it was paid for the cancellation of a contract. [R. 73.] The contract referred to is the contract of May 5, 1941, under which petitioner as owner of the trade-mark "The Stuart Formula" and as manufacturer of the product sold under that name granted to The Stuart Company the exclusive distributorship of that product. [R. 55-58.] Such exclusive distributorship was subject to cancellation by petitioner if Stuart did not meet specified quotas. [R. 56.] Stuart was not otherwise bound to any quotas or otherwise bound to make any purchases from petitioner. [R. 56-57.]

By October, 1942, various disagreements between petitioner and The Stuart Company had reached a stage of impasse. Stuart began to drag its sales in an attempt to force petitioner to give Hanisch a 50% interest in "The Stuart Formula" trade-mark and some shares of petitioner's stock. Petitioner refused both of those demands. [R. 59-60.] By letter dated October 8, 1942, petitioner notified Stuart that, because of failure of Stuart to meet its quotas under the May 5, 1941 contract, its exclusive distributorship under that contract was cancelled, effective at the expiration of 60 days. [R. 60-61.] The 60-day period was a period allowed Stuart under the May 5, 1941, contract to cure any such shortages. [R. 56-57.] In that letter of October 8, 1942, petitioner also stated: "In all other respects, the contract remains in full force and effect." [R. 61.]

On October 12, 1942, Stuart replied that it did not believe it could cure the shortages, that it accepted the no-

tice of cancellation, that it considered the entire contract cancelled and not just the exclusive distributorship, and that it would not recognize any attempt on petitioner's part to withdraw the notice of cancellation. [R. 61-62.]

Petitioner had added the sentence "In all other respects, the contract remains in full force and effect" only to protect its property rights in the trade-mark, because of the provision in the contract under which it was agreed that the trade-mark "The Stuart Formula" was and remained the property of petitioner. [R. 47, 113, 143-145.] It was petitioner's belief that its notice of cancellation cancelled petitioner's right to supply Stuart and Stuart's right and obligation to buy. [R. 144-145.] By its letter of October 12, 1942, Stuart expressly took the same view. [R. 62.]

Subsequent to that reply, on October 23, 1942, petitioner's directors ratified the notice letter of October 8, 1942. [R. 62-63.] Anticipating a struggle with Stuart over the cancellation, they also authorized petitioner's officers "to take any and all necessary further steps, including the prosecution or defense of any litigation that may ensue therefrom," and "to settle said litigation, and/or sell 'The Stuart Formula' trade-mark." [R. 62-63.] They gave the officers no authority to cancel any contract. The contract of May 5, 1941, had been cancelled and they ratified it. The only authority which they gave petitioner's officers was to prosecute or defend, and settle, any ensuing litigation, and to sell the trade-mark.

On November 25, 1942, petitioner filed a suit for injunction against Stuart, Hanisch and others. [R. 63.] In that suit petitioner alleged, and it was a fact, that Stuart was preparing, without the consent or approval of petitioner, to use petitioner's trade-mark "The Stuart

Formula” on products not manufactured by petitioner, and of quality inferior to those manufactured by petitioner. [R. 108-109, 114.] What petitioner sought in that suit was only to have Stuart enjoined from using that trade-mark on products not manufactured by petitioner. Petitioner sought no damages; it sought only protection of its property in the trade-mark. [R. 109, 114.]

A temporary restraining order was granted, and on November 28, 1942, the litigation was settled. It was settled, as well it could be, by a transfer of the trade-mark for consideration, from petitioner to The Stuart Company. [R. 65, par. 2; R. 110-111.] In other words, the officers of petitioner settled the litigation by exercising their alternative or additional authority to sell the trade-mark. Petitioner’s officers had no authority at that point to cancel any contract of any kind.

It is true that in terms the settlement agreement of November 28, 1942, also cancelled the distributorship contract of May 5, 1941. [R. 65.] As stated, however, in *Helvering v. Tex-Penn Oil Co.*, 300 U. S. 481, 493 (1937), affirming the Third Circuit, which reversed the Tax Court, the validity of a finding “is to be tested by what in fact was done rather than by the mere form of words used in the writings employed.” As also stated more recently in *Wilson Athletic Goods Manufacturing Company v. Commissioner* (C. A. 7), 222 F. 2d 355, 357 (1955), reversing the Tax Court:

“But in tax matters we are not bound by the strict terms of the agreement; we must examine the circumstances to determine the actualities and may sustain or disregard the effect of a written provision, if to do so best serves the purposes of the tax statute.”

The fact here is that the settlement agreement of November 28, 1942, did not cancel the May 5, 1941, distributorship contract because on November 28, 1942, that contract had already been cancelled. Technically or theoretically, termination of the May 5, 1941 contract was to become effective at the expiration of 60 days after October 8, 1942, or on December 7, 1942. No one can suppose, however, that Stuart would agree on November 28, 1942, to pay \$75,000.00 to cancel a contract which petitioner could not prevent from dying anyway on December 7, 1942.

Respondent may contend that the words in petitioner's notice of cancellation, "In all other respects, the contract remains in full force and effect," served to keep the contract in part alive, despite Stuart's reply of October 12, 1942, accepting the notice and expressly treating it as a complete cancellation. However, it is clear, as a matter of law, that petitioner's notice did terminate the contract completely.

In *Harri Hoffmann v. John H. Pfingsten*, 260 Wis. 160, 50 N. W. 2d 369, 26 A. L. R. 2d 1131 (1951), there was involved an action for injunction and damages for breach of contract. The parties had entered into a contract intended to be permanent whereby the defendant who had invented a shoe dressing was to manufacture it and the plaintiff was to be sole distributor. The quantity to be furnished was stated as 25,000 bottles per month at the price of 15 cents per bottle. Sales not having reached the quantity anticipated, the contract was amended by eliminating the clause fixing the quantity to be furnished and raising the price to 16 cents per bottle. The parties agreed (26 A. L. R. 2d at p. 1134):

"That said contract in all other respects shall remain in full force and effect."

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"That said contract in all other respects shall remain in full force and effect."

The court there conceded that there was mutuality of obligation in the original contract but observed that as the contract was amended plaintiff's only agreement was to refrain from handling competitive products. It was not required to handle defendant's products at all. For that reason the court held that the contract was lacking in mutuality and was therefore unenforceable. This case is thoroughly annotated in 26 A. L. R. 2d beginning at page 1139. All of the cases on that question are there cited, analyzed and classified. There is not a single case which dissents from the view of the *Hoffman* case that a contract is lacking in mutuality under the circumstances stated.

The situation here is identical. Here, also, there was a distribution contract. Here, also, by modification—here pursuant to the terms of the original contract—the exclusive feature was stricken out. It was only that feature which was made dependent upon purchase of a specified amount. [R. 56-57.] As a result, when that feature was stricken out, there was left no obligation on the part of Stuart to buy. As the evidence further shows there was no intention even that there remain an obligation on the part of Stuart to refrain from buying products from any company other than petitioner. [R. 144-145.] But, even if there was such an intention, it follows clearly under the *Hoffmann* case that that element alone does not give the contract, or what remained of the contract, mutuality, and for lack of mutuality the contract must necessarily fall. It follows then that The Stuart Company acted upon good advice when it wrote its letter of October 12, 1942, and informed petitioner that it regarded the contract as terminated. At the time of the settlement agreement on November 28, 1942, the contract of May 5,

1941, no longer had existence. Obviously a contract which does not exist cannot be cancelled.

B. No Part of the Amount Paid Petitioner Under the Settlement Agreement of November 28, 1942, Can Be Allocated to Cancellation of the Distributorship Contract of May 5, 1941, and Treated as Ordinary Income, Because the Sale of the Good Will and Trade-Mark to the Stuart Company Necessarily, as a Matter of Law, Carried Such Cancellation With It.

The Tax Court on this issue states its conclusion as follows:

“Since the \$75,000 was received by petitioner for the cancellation of its contract with Stuart, the amount is taxable as ordinary income.” [R. 73.]

It is clear from that statement that the Tax Court has wholly misconceived the law. It cites two cases, *Roscoe v. Commissioner* (C. A. 5), 215 F. 2d 478 (1954), and *Commissioner v. Starr Bros., Inc.* (C. A. 2), 204 F. 2d 673 (1953). The *Roscoe* case involved nothing but a 10% commission paid in the guise of an increase in the price of stock. Of course, it was ordinary income. The *Starr Bros.* case involved compensation received by a distributor of certain products for termination of his distributorship, and nothing more. It neither involved nor effected a transfer of any asset.

The *Starr Bros.* case has now been limited to that situation. In that case the Second Circuit expressly admitted it was in direct conflict with the Tenth Circuit in *Jones v. Corbyn*, 186 F. 2d 450 (1951), and the Third Circuit in *Commissioner v. Golonsky*, 200 F. 2d 72, cert. denied 345 U. S. 939, 73 S. Ct. 830 (1953). In the *Jones*

case the Tenth Circuit held that the cancellation of an exclusive general agency insurance contract was a sale of the agency rights to the insurance company. The Court there said, at p. 453:

“The fact that the suit ended in a compromise settlement does not change the nature of the recovery. The nature of the basic claim from which the amount is received is the determining factor.”

In the *Golonsky* case the Third Circuit held that money received by a tenant for getting out of possession of leased premises and turning them over to the landlord before the expiration date of the lease were the proceeds of the sale of the lessee's rights to the landlord.

In *Commissioner v. Ray*, 210 F. 2d 390, cert. denied 348 U. S. 829, 75 S. Ct. 53 (1954), the Fifth Circuit joined the Third and agreed with the *Golonsky* case. Then the Second Circuit, distinguishing its own *Starr Bros.* case on its particular facts, joined the other circuits and expressly agreed with the *Golonsky* and *Ray* cases. *Commissioner v. McCue Bros. & Drummond, Inc.*, 210 F. 2d 752, cert. denied, 348 U. S. 829, 75 S. Ct. 53 (1954). The Court there expressly limited the point of the *Starr Bros.* case to a situation in which no *transfer of property rights* was involved or effected. Because of that result we do not challenge the *Starr Bros.* case. We have no need to.

That Circuit, the Second, has now given the principle of the *Golonsky* case its full meaning. In *Millinery Center Bldg. v. Commissioner*, 221 F. 2d 322 (1955), reversing 21 T. C. 817, it held that where a lessee for a fixed sum obtained cancellation and termination of an onerous lease and also title to the property no amount could be allocated to cancellation of the lease but the entire amount

represented the cost of acquiring a capital asset. The Court there stated, at page 323:

“Whatever may be the case where a lease is cancelled without the purchase of a fee, we think that the situation here at hand consists of the acquisition of a definite and substantial property interest, so to be viewed for tax purposes.”

and at page 324:

“We reach this result whether or not the lease was in fact onerous to the taxpayer, as it contends;”

It is interesting in this connection to note that the Tax Court here also made reference to a decision of this Court, *Stuart Co. v. Commissioner*, 195 F. 2d 176 (1952), in which this Court affirmed the Tax Court solely because it could “not find that there was clear error in the Tax Court’s findings of fact and opinion.” That case involved The Stuart Company’s side, the deduction side, of this same transaction between that company and petitioner. The Tax Court there, 9 T.C.M. 585, stated, at page 590:

“It is well settled that payments made to secure relief from an onerous contract are deductible as ordinary and necessary business expenses under Section 23(a) of the Internal Revenue Code.”

In support of that doctrine it cited three cases, only one of which involved a transfer of property, *Cleveland Allerton Hotel, Inc. v. Commissioner* (C. A. 6), 166 F. 2d 805 (1948). With the case of *Millinery Center Bldg. v. Commissioner*, *supra*, we have then come full circle; for the Second Circuit there stated, at page 323:

“With this conclusion we are in agreement, despite the contrary opinion of the Sixth Circuit in *Cleveland Allerton Hotel v. Commissioner*, 6 Cir., 166 Fed. 2d 805.”

Thus the doctrine that the cancellation of an onerous contract necessarily results in ordinary income, even if the effect of the cancellation is a transfer of property, has lost its sanctity. The logic of the *Millinery Center* case is clear. If a lessee and lessor make an agreement whereby (1) the lease is cancelled and (2) the fee is conveyed to the lessee, (1) is superfluous since it automatically follows from (2). *Erving v. Jas H. Goodman & Co. Bank*, 171 Cal. 559, 563, 153 P. 945 (1915). Likewise, if as here, an exclusive distributor acquires from the manufacturer the trade-mark under which the product is sold, "together with the good will of the business directly connected with the use of said trade-mark" [R. 111], he ceases to be a distributor and becomes the manufacturer, and this is true even if he retains the original manufacturer to produce the product. *Warner-Patterson Company v. U. S.*, 68 Ct. Cls. 237 (1929). The distributorship which he had acquired from the original manufacturer would then have merged with the trade-mark and, as a separate bundle of rights, ceased to exist. All of this follows also as a matter of simple logic. He who owns a trade-mark has no need to have also a distributorship, exclusive or otherwise; he already holds those rights.

It follows here that even if the distributorship agreement between petitioner and The Stuart Company were still in existence on November 28, 1942, and was in fact onerous to The Stuart Company, and was in fact terminated by the agreement of November 28, 1942, even so the consideration of \$200,000.00 received by petitioner under that agreement must be allocated entirely to the trade-mark and good will which, pursuant to the terms of that agreement, petitioner assigned to The Stuart Company.

CONCLUSION.

Petitioner submits, in conclusion, that (1) the Tax Court had jurisdiction to determine the deduction allowable for the year ended October 31, 1942, for compensation of M. H. Lewis, (2) that the full amount paid him in that year should have been allowed, (3) that the full amount paid him in the year ended October 31, 1943, should have been allowed as deduction for that year, (4) that the basis of the good will and trade-mark sold to The Stuart Company on November 28, 1942, included the full amount paid by petitioner to M. H. Lewis for the good will conveyed by him to petitioner on February 4, 1941, (5) that the Commissioner failed to carry his burden of proof as to the portion of that amount which he allowed in the deficiency notice but later asked, by amended answer, to be disallowed, and (6) that the entire amount received by petitioner under the agreement with The Stuart Company dated November 28, 1942, represented the proceeds of sale of a capital asset and no part thereof was ordinary income.

Respectfully submitted,

GEORGE T. ALTMAN,

Attorney for Petitioner.





APPENDIX.

A. Extracts From the Internal Revenue Code of 1939.

SECTION 23. DEDUCTIONS FROM GROSS INCOME.

(a) EXPENSES.

(1) TRADE OR BUSINESS EXPENSES.

(A) IN GENERAL. All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered. . . .

SECTION 111. DETERMINATION OF AMOUNT OF, AND RECOGNITION OF, GAIN OR LOSS.

(a) COMPUTATION OF GAIN OR LOSS. The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 113(b) for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

SECTION 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) BASIS (UNADJUSTED) OF PROPERTY. The basis of property shall be the cost of such property. . . .

SECTION 113(b).

ADJUSTED BASIS. The adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis determined under subsection (a), adjusted as hereinafter provided.

SECTION 117. CAPITAL GAINS AND LOSSES.

(a) DEFINITIONS. As used in this chapter—

- (1) CAPITAL ASSETS. The term “capital assets” means property held by the taxpayer. . . .

SECTION 122. NET OPERATING LOSS DEDUCTION.

(b) AMOUNT OF CARRY-BACK AND CARRY-OVER.

(1) NET OPERATING LOSS CARRY-BACK.

(A) Loss for Taxable Year Beginning Before 1950. If for any taxable year beginning after December 31, 1941, and before January 1, 1950, the taxpayer has a net operating loss, such net operating loss shall be a net operating loss carry-back for each of the two preceding taxable years, except that the carry-back in the case of the first preceding taxable year shall be the excess, if any, of the amount of such net operating loss over the net income for the second preceding taxable year computed.

SECTION 272. PROCEDURE IN GENERAL.

(g) JURISDICTION OVER OTHER TAXABLE YEARS. The Board in redetermining a deficiency in respect of any taxable year shall consider such facts with relation to the taxes for other taxable years as may be necessary correctly to redetermine the amount of such deficiency, but in so doing shall have no jurisdiction to determine whether or not the tax for any other taxable year has been overpaid or underpaid.

B. Rules of Practice Before the Tax Court of the United States Rule 32—Burden of Proof.

The burden of proof shall be upon the petitioner, except as otherwise provided by statute, and except that in respect of any new matter pleaded in his answer, it shall be upon the respondent.

No. 14692.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

NATIONAL WHOLESALERS, a Corporation; M-D PARTS
MANUFACTURING COMPANY, NATIONAL PARTS COM-
PANY and HENRY MEZORI,

Appellees.

Notice of Motion to Dismiss Appeal and Motion to
Dismiss Appeal With Points and Authorities.

WM. H. NEBLETT,
649 South Olive Street,
Los Angeles 14, California,
Attorney for Appellees.

FILED

JUN 17 1955

PAUL P. O'BRIEN, CLERK

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No. 14692.

IN THE

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UNITED STATES OF AMERICA,

Appellant,

vs.

NATIONAL WHOLESALERS, a Corporation; M-D PARTS
MANUFACTURING COMPANY, NATIONAL PARTS COM-
PANY and HENRY MEZORI,

Appellees.

NOTICE OF MOTION TO DISMISS APPEAL.

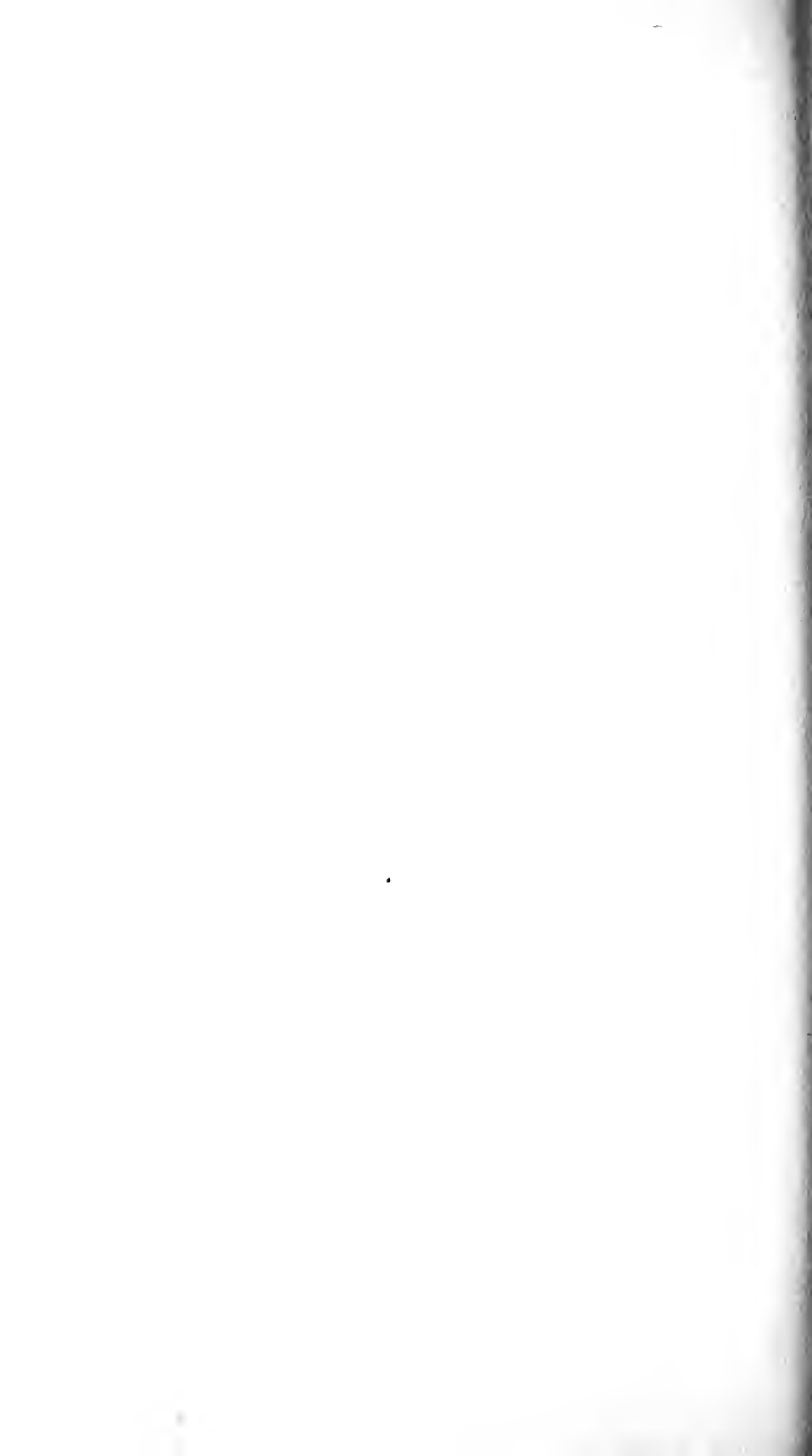
*To the Appellant Above Named and to Its Attorneys,
Laughlin E. Waters, United States Attorney, and
to Max F. Deutz and Andrew J. Weisz, Assistants
United States Attorney, and to Paul W. O'Brien, the
Clerk of This Court:*

You, and each of you, will please take notice that the appellees will be and appear before The Honorable, The United States Court of Appeals for the Ninth Circuit, at the United States Post Office and Court House Building, San Francisco, California, at 10:00 o'clock A. M., on Monday, June 27, 1955, and then and there move the Court to dismiss this appeal. The motion to dismiss follows.

Dated: June 16, 1955.

WM. H. NEBLETT,

Attorney for Appellees.



No. 14692.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

NATIONAL WHOLESALERS, a Corporation; M-D PARTS
MANUFACTURING COMPANY; NATIONAL PARTS COM-
PANY, and HENRY MEZORI,

Appellees.

MOTION TO DISMISS APPEAL.

Come now the appellees and move the Court to dismiss the appeal herein.

THE GROUNDS OF THE MOTION ARE:

(1) This Court is without jurisdiction to hear and determine this appeal;

(2) The appellant, United States of America, was not aggrieved by the decision of the District Court and cannot maintain this appeal;

(3) The decision of the duly authorized contracting officer for Army Ordnance, finding that the 6600 voltage regulators furnished by appellees to appellant complied

with the contract, cannot be attacked by appellant in the courts. The appellant is bound by its own decision, which became final October 16, 1950, nearly three years before the complaint was filed in the District Court, July 3, 1953; and,

(4) There is no merit in the appeal.

The Motion is made upon the printed transcript of the record, filed herein, and upon the points and authorities following this motion.

The opinion of the District Court for the Southern District of California, Central Division, directing a judgment of dismissal of the plaintiff's complaint is reported: 126 Fed. Supp. 357 (Dec. 1, 1954).

Dated: June 16, 1955.

WM. H. NEBLETT,

Attorney for Appellees.

Points and Authorities.

I.

The decision [Dept. Ex. A, Tr. 115-118], dated October 16, 1950, of the contracting officer for Army Ordnance, the duly delegated representative of the Secretary of the Army, was final as to the Government when made.

Public Contracts Law of 1948, as amended, 41 U. S. C. Secs. 156 and 257.

II.

The correctness of the determination by the Secretary or his authorized representative is not open to judicial review.

U. S. v. Binghampton Construction Co., 347 U. S. 171, 177, 74 S. Ct. 438, 441 (1954, citing Public Contracts Law, 41 U. S. C. Sec. 35 *et seq.*);

Wann v. Ickes, Secretary of the Interior (C. A. D. C.), 92 F. 2d 215, 217 (1937);

Standard Oil Co. of California v. United States (C. A. 9), 107 F. 2d 402, 422 (1940);

Estes v. Timmons, 199 U. S. 391, 26 S. Ct. 85, 86 (1905);

Whitcomb v. White, 214 U. S. 15, 29 S. Ct. 599, 600 (1909);

De Cambra v. Rogers, 189 U. S. 119, 23 S. Ct. 519, 520-521 (1903).

III.

The United States cannot question administratively or judicially the decision of the head of an executive department or his delegated representative whom he has authorized to make the decision.

United States v. Bucher (C. A. 8), 15 F. 2d 783, 786 (1926);

National Labor Relations Board v. Air Associates, (C. A. 2), 121 F. 2d 586, 590 (1941);

United Foundation Corp. v. United States (Ct. Cl.), 127 F. Supp. 798 (1955);

Johnson Contracting Corp. v. United States (Ct. Cl.), 119 F. Supp. 788, 792 (1954);

Brown & Root v. United States (Ct. Cl.), 116 F. Supp. 732, 739 (1953).

IV.

The final decision of the contracting officer [Deft. Ex. A, Tr. 115-118] involved the exercise of his discretion and is not subject to review by the judicial branch of the Government.

Friend v. Lee, Adm'r, Civil Aeronautics Administration (C. A. D. C.), 221 F. 2d 96, 100 (1955).

V.

The contract for the 6600 voltage regulators, No. DA-20-018-ORD-3951, dated April 1, 1950, is not in the printed transcript. The contract contained [Tr. 41, Par. 14] the standard dispute clause prescribed by The Congress (41 U. S. C., *Appendix, Sections* 54.1 and 54.13,

Article 15). The settlement of a dispute by the Secretary or his authorized representative under such a dispute clause cannot be attacked by the Government without pleading and proving fraud on the part of the officer making the decision. The complaint alleged no fraud on the part of the contracting officer. His authority was conceded by the Government.

United States v. Moorman, 338 U. S. 457, 70 S. Ct. 288 (1950);

United States v. Wunderlich, 342 U. S. 98, 100, 72 S. Ct. 154, 155 (1951);

Sunroc Refrigeration Co. v. United States (D. C. E. D. Penn.), 104 F. Supp. 131 (1952).

VI.

The provisions of the *Act of May 11, 1954* (41 U. S. C. Secs. 321-322) are solely for the benefit of the contractor. The Act gives the contractor the right to certain relief in the courts not formerly enjoyed by him; The Act leaves the Government in the exact position, with relation to administrative decisions made by executive departments, the Government occupied before the passage of the Act. The Government is still bound by its own final decisions and cannot reopen them administratively or judicially, unless fraud on the part of the officer making a decision is pleaded and proved.

House Report, No. 1380, March 22, 1954, *United States Code, Congressional and Administrative News, Volume 2*, pp. 2191-2197.

VII.

A party may not appeal from a judgment unless he has been aggrieved by it. A party is not aggrieved by a judgment when it is apparent on the face of the record that he has no standing to prosecute the appeal. The Government's appeal here amounts to nothing more than an attack upon a final decision made by one of its executive departments, the only body authorized by The Congress to make the decision. The rule is the same as if the Government had prosecuted this suit in the District Court to set aside a final judgment of a court, having jurisdiction of the parties and of the controversy, and after decision there, upholding the former judgment, to try to relitigate the things decided by the former final judgment in the Court of Appeals.

Public Contracts Law of 1948 as amended, Secs. 156 and 257;

United States v. Adamant Co. (C. A. 9), 197 F. 2d 1, 5 (1952);

In re Michigan-Ohio Bldg. Corp. (C. A. 7), 117 F. 2d 191, 193 (1941);

Clackamas County, Ore. v. Mackay, Sec. of the Interior (C. A. D. C.), 219 F. 2d 479 (1954);

F. P. Newport Corp., Ltd. v. Sampsell (C. A. 9), 216 F. 2d 344 (1954).

VIII.

Fraud is the basis of an action brought by the Government to recover the penalties and damages provided in 31 U. S. C., Section 231. Where the District Court has found that there was no fraud committed by the con-

tractor either in the bidding or in the performance of the contract, the appeal may be dismissed for failure of the record to raise an issue of law which an appellate court may consider and decide. There is no merit in this appeal. [Find. III-IX, Tr. 48-51]. Fraud was the only issue tried by the District Court [Pre-Trial Stip., Tr. 36].

Rule 52(a), F. R. C. P.;

United States ex rel. Brensilber v. Bausch & Lomb Optical Co. (C. A. 2), 131 F. 2d 545, 546 (1942), *affd.* 320 U. S. 711, 64 S. Ct. 187 (1943);

Fibreboard Products v. Townsend (C. A. 9), 202 F. 2d 180 (1953);

Central Steel Tube Co. v. Herzog (C. A. 8), 203 F. 2d 544, 546 (1953);

Empire District Electric Co. v. Rupert (C. A. 8), 199 F. 2d 941 (1952);

Maryland Casualty Co. v. Independent Metal Products Co. (C. A. 8), 203 F. 2d 838, 841 (1953);

Clarke Hybrid Corn Co. v. Stratton Grain Co. (C. A. 8), 214 F. 2d 7, 9 (1954).



**In the United States Court of Appeals
for the Ninth Circuit**

UNITED STATES OF AMERICA, APPELLANT,

v.

**NATIONAL WHOLESALERS, A CORPORATION; M-D PARTS
MANUFACTURING COMPANY; NATIONAL PARTS COM-
PANY; AND HENRY MEZORI, APPELLEES**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL
DIVISION**

BRIEF FOR APPELLANT

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 14692

UNITED STATES OF AMERICA, APPELLANT,

v.

NATIONAL WHOLESALERS, A CORPORATION; M-D PARTS
MANUFACTURING COMPANY; NATIONAL PARTS COM-
PANY; AND HENRY MEZORI, APPELLEES

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL
DIVISION*

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This action was instituted under the False Claims Act, Rev. Stat. 3490-3492, 5438, 31 U. S. C. 231-233, *infra*, pp. 37-39, to recover amounts alleged to be owing the United States by reason of appellees' submission of claims to the Government for payment with the knowledge that they were false, fictitious or fraudulent (R. 3-10). The jurisdiction of the District Court over the action rested upon 31 U. S. C. 232. On December 16, 1954 the United States District Court for the Southern District of California, Central Division,

entered judgment dismissing the complaint (R. 54). On February 9, 1955 the United States filed notice of appeal (R. 54). The jurisdiction of this Court rests upon 28 U. S. C. 1291.

STATEMENT OF THE CASE

On February 15, 1950 the Detroit Ordnance District of the Department of the Army extended a written invitation to 56 business concerns to submit bids for the furnishing of 6,600 generator regulators, "Mfr's Part Nos. DR-1118502, GM-1118502, IHC-50301-R1, or equal" (SR. 295).¹ The invitation stipulated [Special Condition 2e] that a bidder failing to indicate that he proposed to furnish a substitute "or equal" item would, if awarded the contract, be required to furnish the article specifically referred to, "without substitution of any kind" (S.R. 292). It further stipulated [Special Condition 2d] that any bidder offering in his bid to supply a substitute item as an "or equal" was to submit "*with the bid*, all necessary specifications, drawings, bills of material and other pertinent supporting data" to enable the Army to determine whether the proposed "equal" product would be acceptable for its intended use (SR. 292).

On April 1, 1950, appellee National Wholesalers (hereinafter referred to as "Wholesalers") entered a bid "in compliance with * * * the * * * invitation for bids, and subject to all conditions thereof" (SR. 286). This bid contained no indication that Wholesalers intended to furnish an "or equal" item for the generator regulator specified by part numbers in the

¹ The invitation extended to appellees appears in the supplemental printed record, designated as "SR".

invitation, which Wholesalers correctly understood to be a regulator manufactured by the Delco-Remy Division of the General Motors Corporation (R. 32). To the contrary, Wholesalers expressly represented in its bid that it was "Bidding DR-1118502"² and the bid was not accompanied by the specifications and drawings which, under the terms of the invitation, were to be supplied in circumstances where the bidder intended to supply an "or equal" item (SR. 295). Further, the bid stated that Wholesalers was a dealer, rather than a manufacturer, of regulators (SR. 294).

This bid was accepted by the Army on the day of its receipt (R. 31). Wholesalers, however, did not undertake to deliver No. DR-1118502 Delco-Remy regulators, as the bid indicated it intended to do. Instead, in conjunction with two affiliates, appellees M-D Parts Manufacturing Company and National Parts Company, Wholesalers undertook itself to manufacture and assemble regulators for delivery to the Government under the contract (R. 33). In the manufacturing and assembling process, some genuine Delco-Remy parts were employed; other parts, as will appear in more detail below, were acquired from and manufactured by sub-contractors of Wholesalers in the Los Angeles area who had no connection whatsoever with Delco-Remy (R. 33).

² This representation was necessitated by Special Condition 2a of the invitation which provided that (SR. 292): "The bidder *must indicate* the part number which he proposes to furnish in the space provided alongside the items on which he is submitting a bid. Bids received which do not indicate clearly the part number which will be furnished and which, in the case of "or equals", are not accompanied by fully revealing specifications and drawings, may be deemed non-responsive by the Contracting Officer." [Emphasis appears in the original.]

After these regulators were assembled, appellees affixed to each a counterfeit nameplate which was identical in size, shape and color scheme with the genuine nameplate used by Delco-Remy itself on its own regulators and which bore this legend (R. 33, 183):

Delco-Remy
Generator Regulator
Model 1118502
6 Volt System 40 Ampere
Negative Ground
Made in U.S.A.

These counterfeits were obtained by appellees in the following manner. In May, 1950 one Lang, an employee of M-D Parts, appeared at the establishment of a manufacturer of nameplates named Nelson (R. 183). Using Nelson's purchase order blank, Lang placed an order for 7,000 Delco-Remy nameplates (R. 183, 185). Lang represented that he was associated with the "Thompson Distributing Company," a fictitious company, and signed the order form with the name of that company and his own name (R. 185). After he received and paid for the counterfeit nameplates, Lang insisted that Nelson return to him the order form he had executed (R. 187). Nelson complied with this request and it was only several months later that he discovered that Lang was in actuality an employee of M-D Parts and had placed the order on behalf of appellees (R. 185).

Between June 19, 1950 and September 14, 1950, Wholesalers delivered seventeen shipments of these regulators, manufactured by itself and bearing the

spurious Delco-Remy nameplates, to various Army arsenals (R. 33). These shipments, totaling 4,086 regulators, were each accompanied by an invoice which (1) described the item being furnished as a DR-1118502 regulator; (2) *made no reference to "or equal"*; and (3) contained Wholesalers' certification that "[t]his bill is correct and just" and that "all conditions of purchase applicable to the transactions have been complied with."³ Additionally, the invoices carried the certification of one Duffy, the resident Army ordnance inspector at Wholesaler's establishment, that he had accepted the articles as conforming to the contractual requirements (R. 103). Duffy, relying on the outward appearance of the regulators, had assumed that they were of Delco-Remy manufacture, as the certification in the invoice represented (R. 200). For this reason, after a visual inspection to make certain that, among other things, no corrosion had taken place he had accepted the regulators as being of Delco-Remy manufacture (R. 196-197).

On the basis of Wholesalers' certification, and the acceptance of the regulators by the resident ordnance inspector in the belief that they were genuine Delco-Remys, the amount claimed in each of the seventeen vouchers, totalling \$96,021, was duly paid to Wholesalers.⁴ On or about September 14, 1950, however, the Army discovered that the regulators that had been supplied were not of Delco-Remy manufacture but in-

³ One of these invoices is reproduced as an illustrative example at page 103 of the record. The other sixteen invoices, which also were introduced into evidence below as part of Government exhibit 1 (R. 100-101), are identical in material part.

⁴ The Government checks representing payment of \$23.50 for each of the 4086 regulators are included in Government exhibit 1. One of them appears in the supplemental printed record (SR. 296).

stead were "chinese copies" (R. 116). As a result, the resident inspector was instructed not to accept any more regulators and the Contracting Officer arranged for the Detroit Arsenal of the Ordnance Corps to determine whether the balance of Wholesalers' regulators would be acceptable on an "or equal" basis (R. 117).

On October 16, 1950 the Contracting Officer wrote to Wholesalers advising that its regulator qualified as an "or equal" and that delivery of the remaining regulators called for by the contract would be accepted on the basis (R. 116-118). The letter made no reference, however, to any decision by the Government to waive the misrepresentations contained in Wholesalers' certification respecting the 4,086 regulators already delivered. Instead, it specifically called Wholesalers' attention to the facts (1) that it had contracted to supply genuine Delco-Remy regulators; (2) that it failed to follow the procedure set forth in the invitation for qualifying "or equal" items; (3) that it had represented that it was not a manufacturer of regulators; and (4) that it had tendered for acceptance regulators bearing counterfeit Delco-Remy nameplates (R. 117).

On July 3, 1953, the Government filed its complaint under the False Claims Act, *infra*, pp. 37-39, alleging that the seventeen invoices submitted for payment prior to September 14, 1950 (the date that the Army suspended delivery) were false, fictitious or fraudulent and were known to be such by appellees (R. 3-10). In its prayer for relief, the Government demanded double damages plus the \$2,000 prescribed by the Act for each false claim (R. 10). In its answer, appellees denied the allegations of fraud and relied by way of an affirmative defense upon the acceptance by the Army of the

balance of the regulators on an "or equal" basis (R. 12-17).

At the trial, the Government demonstrated, in addition to the facts summarized above, that the counterfeit regulators supplied by appellees differed in several material respects from the genuine Delco-Remy regulator which appellees had represented they were bidding on and had certified in their invoice that they were supplying. At the outset, the court below ruled that this evidence was incompetent, irrelevant and immaterial but permitted the Government to make a record of it in accordance with Rule 43(c) of the Federal Rules of Civil Procedure (R. 135, 147, 154, 159, 164, 175, 179, 188, 219). Subsequently, however, the District Court partially reversed its position and ruled that it would receive the evidence "on the issue of whether or not the claims presented were false or fraudulent" but not "as being relevant to any issue of whether or not the regulators [supplied] were inferior [to the genuine Delco-Remy]" (R. 249).

The evidence admitted by the court for this limited purpose showed that the armature assemblies used in appellees' regulators were manufactured and supplied by the Acme Electronics Company (R. 134, 140-143). Each of these armatures contained, as essential parts thereof, hinges made of either bronze or steel (R. 143). The DR-1118502 regulator at the time in question contained hinges made of bimetal, which, while similar to steel, possesses different electrical characteristics as well as a great flexibility under heat (R. 143-144, 223). Delco-Remy used bimetal hinges because bimetal insures constant voltage, an extremely important function of a voltage regulator (R. 227-229). The voltage of regulators with non-bimetal hinges, on the other hand,

will vary as much as 20%, depending upon climatic conditions and the temperature of the unit (R. 227).

Another material difference between the Delco-Remy regulator and appellees' regulator related to the upper and lower insulating plates. Appellees' plates were purchased locally from one LaMoree and were made of a paper-based phenolic substance (R. 158-163). Delco-Remy, however, employed a linen-based material both in its DR-1118502 regulator, which was designed specifically for heavy military duty, and its other regulators made for use in large vehicles (R. 230, 233). While the insulating properties of both linen-based and paper-based plates of the same thickness are equivalent, the former are considerably more durable and will take much greater abuse before cracking (R. 231). For this reason, Delco-Remy restricts the use of paper-based plates to regulators intended for use in light passenger vehicles, where durability is not a significant factor (R. 233).

Appellee Mezori, in his capacity as general manager of the three appellee companies, personally passed upon the subcontracts with Acme and LaMoree (R. 113). As a result, he knew that the hinges were not made from bimetal and that the insulation was paper-based (R. 167, 238, 239). Furthermore, Wholesalers' Sales Manager Kornbacher, who possessed similar knowledge, discussed the performance of the contract with Mezori in late April or early May of 1950 (R. 169). During the discussion, Mezori stated that he "would deliver to the Army regulators assembled by him made to appear like the Delco-Remy model" (R. 169). Kornbacher thereupon suggested that the Army be advised of this intention since "the original item we thought we were going to furnish the Army [is] not the item

they desired.” (R. 170). According to Kornbacher, this suggestion was not “vetoed” by Mezori but it was “never acted upon, either” (R. 170).

On December 1, 1954 Judge Mathes entered an order directing appellees to submit proposed findings of fact, conclusions of law and judgment dismissing the complaint (R. 42-46). In this order, he expressed the view that the regulators supplied by appellees complied with the contract “as it must be here construed in the light of the ambiguities of form and content it bears” (R. 45). On December 16, 1954 findings of fact, conclusions of law, and judgment dismissing the complaint were entered (R. 46-54). The court found *inter alia* that (1) the contract did not require the delivery of genuine Delco-Remy regulators but instead permitted delivery of “or equals” and (2) appellees had not submitted to the Government for payment claims which were false, fictitious, or fraudulent (R. 50). In its conclusions of law, the court ruled *inter alia* that the October 16, 1950 letter of the Contracting Officer, advising that the balance of the regulators would be accepted on an “or equal” basis, prohibited the Government from demonstrating that, in fact, the regulators previously delivered were inferior (R. 53). This appeal followed.

SPECIFICATIONS OF ERROR RELIED UPON

1. The court below erred in holding that the contract between the United States and appellee permitted the delivery of other than genuine Delco-Remy regulators.

2. The finding of the court below that the regulators supplied by appellees as Delco-Remys met the specifications contained in the contract is clearly erroneous.

3. The finding of the court below that appellees did not submit for payment by the United States claims

known by them to be false and fraudulent is clearly erroneous.

4. The finding of the court below that the regulators supplied by appellees as Delco-Remys were not inferior in material respects to the genuine Delco-Remy regulator is clearly erroneous.

5. The court below erred in holding that the Contracting Officer's letter of October 16, 1950 was a written decision to the effect that the 4086 regulators here involved qualified as "or equals" and accorded with the specifications of the contract.

6. The court below erred in holding that the Contracting Officer's letter of October 16, 1950 was conclusive on the question as to whether the regulators supplied by appellees as Delco-Remys were inferior to the genuine Delco-Remy regulator.

7. The court below erred in excluding the Government's proof on the question as to whether the regulators supplied by appellees as Delco-Remys were inferior in construction and operation to the DR-1118502 Delco-Remy regulator specified in the contract.

8. The court below erred in ruling by implication that recovery of the statutory forfeiture provided in the False Claims Act is dependent upon a showing of ascertainable damage.

9. The court below erred in holding that the Government was not entitled to recover the statutory forfeiture on each of the seventeen claims in issue.

10. The court below erred in entering judgment dismissing the Government's complaint.

STATUTE INVOLVED

The relevant provisions of the False Claims Act are set forth in the Appendix, *infra*, pp. 37-39.

Introduction and Summary

The undisputed facts in the record reveal that, from the time of their receipt of the invitation to bid on the furnishings of regulators to the Army, appellees engaged in a course of conduct deliberately calculated to defraud the United States in the vital area of the procurement of war materiel. Apparently unmindful of the long established precept that "[m]en must turn square corners when they deal with the Government" [*Rock Island, Arkansas & Louisiana R. Co. v. United States*, 254 U.S. 141, 143], appellees expressly represented in their bid that they would furnish genuine Delco-Remy regulators, a representation which they sought to buttress by further representing that they were a dealer, not a manufacturer, of regulators. Despite these explicit representations they then themselves assembled regulators with non-Delco-Remy parts acquired from local concerns, and delivered them to the Government on invoices in which they certified that the regulators were genuine Delco-Remys. In an effort further to conceal this deception, appellees resorted to an ancient and recurring technique of the defrauder by placing a counterfeit Delco-Remy nameplate on each regulator, nameplates which, in turn, were obtained by appellees clandestinely. In reliance on appellees' certification and the nameplates, which the Government did not know were counterfeit, the Government accepted appellees' regulators as the Delco-Remys called for by the contract.

Notwithstanding appellees' complete and shocking disregard of basic and ordinary standards of honesty, the court below has ruled that their scheme to pass

off their regulators as Delco-Remys does not come within the purview of the False Claims Act. Underlying this ruling are two determinations: (1) that the contract authorized appellees to furnish other than genuine Delco-Remy regulators and (2) that the regulators furnished were in fact equivalent in construction and operation to the Delco-Remy regulator. These determinations themselves rest in large measure upon the meaning and effect accorded by the court to the Contracting Officer's letter of October 16, 1950.

As we show in Point I, *infra*, the court's conclusion that appellees were entitled to furnish "or equal" regulators has no foundation whatsoever in law or fact. To the contrary, appellees' bid, taken in conjunction with the invitation, leaves no room for doubt that the contract called for genuine Delco-Remy regulators and permitted no substitutions of any kind. That appellees were aware of this fact is amply evidenced by *inter alia* their acquisition and use of counterfeit Delco-Remy nameplates, an endeavor involving considerable risk which would have been totally unnecessary had the contract authorized the delivery of an "equal" and had the regulators supplied been in actuality equivalents of the Delco-Remy model. Moreover, the Contracting Officer's letter is devoid of anything to support the court's suggested reading of the contract. If anything, the letter reinforces the conclusion that appellees contractually agreed to supply regulators of Delco-Remy manufacture.

We further show in Point I that the United States was entitled to recover the forfeitures provided in the False Claims Act upon the demonstration that appellees deliberately palmed off their own regulators for the

Delco-Remys required by the contract, that the Army accepted them because it was deceived by false certifications and the counterfeit nameplates, and that appellees received payment because by their deception they had induced the Government into believing that the Delco-Remy had been delivered. It is not material that, in other circumstances, the contract might have been one for the furnishing of non-Delco-Remy regulators. Nor does it make a difference how appellees' regulators compared with the Delco-Remy. It is settled that the submission of a false claim to the Government gives rise to liability for the \$2000 prescribed by the Act without proof of ascertainable actual damage flowing therefrom. The statutory amount represents liquidated damages for those losses sustained in connection with the false claims which, because of their nature, cannot be reduced to a monetary equivalent—as, for example, the expense incurred by the Government in ferreting out and investigating the fraud.

While it is not essential to prove actual damages, the Government nevertheless offered ample and uncontroverted evidence that appellees' regulators differed in several material respects from, and were inferior to, the Delco-Remy model which appellees represented them to be. We show in Point II, *infra*, that the District Court erred in rejecting this evidence. The Contracting Officer's letter, insofar as it related to the purported equality of appellees' regulators, was not a decision under the disputes clause of the contract entitled to finality by reason of *United States v. Wunderlich*, 342 U.S. 98. And, even if the letter were to be deemed within the scope of the *Wunderlich* doctrine, it did not have any bearing upon the acceptability of

the 4086 regulators here involved which were delivered prior to the letter.

I

Appellees Knowingly Submitted False and Fraudulent Claims to the Government for Payment and Are Liable for the Statutory Amounts Provided in the False Claims Act Irrespective of Whether Ascertainable Actual Damage Resulted Therefrom.

A. The Contract in Terms Called for the Delivery of Delco-Remy Regulators

At the foundation of the decision below that appellees had not presented false, fictitious or fraudulent claims to the Government for payment within the meaning of the False Claims Act is the court's determination that their contract with the United States permitted the delivery of "equal" regulators in lieu of genuine Delco-Remy regulators. As will be seen below, the regulators supplied were decidedly inferior; thus, even if this were a correct construction of the contract, appellees' cause would not be advanced. But the fact is that the court's holding is squarely contradicted by the express terms of the invitation to bid and appellees' responsive bid, which taken together constitute the contract. Additionally, assuming that there is occasion to go beyond the four corners of these documents, the record clearly reflects the understanding of both appellees and the Army that the contract required the furnishing of genuine Delco-Remy regulators.

1. The invitation submitted to appellees by the Army called for a bid on the furnishing of 6,600 "regulator[s], generator, Assy. Mfr's Part Nos. DR-1118502, GM-1118502, IHC-50301-R1 or equal." (SR. 295)

DR-1118502, GM-1118502 and LHC-50301-R1 being part numbers assigned to a regulator model then being manufactured by the Delco-Remy Division of General Motors, bidders were thus authorized *to submit bids* on either Delco-Remy regulators or equivalent regulators of a different manufacture.

At the same time, however, paragraph 2e of the "Special Conditions" attached to the invitation and made a part of the contract, advised bidders that if they intended to offer regulators other than Delco-Remys on an "or equal" basis, they should so indicate on the bid itself (SR. 292). It further advised that in the absence of such indication the bidder, if awarded the contract, *would be required to furnish the Delco-Remy model "without substitution of any kind"* [emphasis supplied] (SR 292). And paragraph 2d detailed the procedure to be followed by the bidder if he intended to furnish any other kind of regulator:

A bidder offering a substitute item as an "or equal" must sustain the burden of providing information in sufficient detail to permit the determination by the Contracting Officer of the "or equal" status of any substitute item so offered by submitting, *with the bid*, all necessary specifications, drawings, bills of material and other pertinent supporting data necessary to permit the Contracting Officer to determine the acceptability of the tendered item of supply to the using service. If supplemental data is requested by the Contracting Officer and such data is not furnished by the bidder, as requested, no further consideration will be given to such bid. [emphasis appears in the original] (SR. 292).

In their bid, appellees failed to disclose that they did not intend to furnish Delco-Remy regulators; similarly, they omitted to submit "specifications, drawings, bills of material," or the other data required with respect to non-Delco-Remy regulators. While these actions would, under the terms of the invitation, be sufficient to require the delivery of Delco-Remy regulators, appellees did not leave to implication their understanding of the contract's requirements; just below the item description on page two of Schedule A of the invitation, they unequivocally stated that they were "Bidding DR-1118502" (SR. 295). And giving further color to this representation, in answer to questions on page one of Schedule A, they denied—falsely, as it now appears—that they manufactured regulators and asserted that they regularly carried a stock of them (SR. 294).

2. In view of the provisions of Special Conditions 2d and 2e, as well as appellees' express representations that they were "Bidding DR-1118502" (*i.e.*, offering to furnish regulators manufactured by Delco-Remy) and that they were not a manufacturer, it is difficult to see how appellees may now be heard to assert that the contract contemplated or permitted the substitution of a regulator of their own manufacture. The Government hardly could have cast into clearer terms than those of paragraph 2e the requirement that, absent an expressed intent in the bid to furnish a substitute item, the successful bidder would be held to the delivery of genuine Delco-Remy regulators. Moreover, while appellees in any event would be charged with constructive knowledge of the terms of the invitation on which they bid, the facts lead to the inevitable conclusion that they were fully aware that, in the circumstances, any regulator

other than Delco-Remys would not meet the contractual requirements.

First of all, there is the matter of the lengths to which appellees went in seeking to prevent the Government from discovering that the regulators were not in fact Delco-Remys. Besides the time and effort attendant to obtaining and affixing the counterfeit nameplates, appellees' devious actions in this connection subjected them to considerable risk. True enough, their employee Lang tried to keep the scheme under cover by first ordering the plates in the name of a fictitious "Thompson Distributing Company" and then once appellees received the plates, insisting that the purchase order—the sole evidence of the transaction—be returned (R. 185-187). But appellees could not have failed to recognize that, despite all such precautions, their unauthorized and improper use of the Delco-Remy name might come to light, leaving them open to the risk of having to pay heavy damages to General Motors for unfair competition and perhaps for trade-mark infringement as well. In view of this very real risk, it taxes the imagination to suppose that appellees would have turned to the use of these Delco-Remy nameplates, which they apparently thought could be obtained only in such an underhanded way, had they not deemed it essential to deceive the resident ordnance inspector into believing that the regulators were in fact Delco-Remys. Certainly no reasonable businessman in appellees' position would have gone to such lengths if he had any basis for believing that the contract did not call for Delco-Remy regulators and hence that the resident inspector would accept regulators of non-Delco-Remy manufacture as complying with the contract.

Further indication that appellees fully understood

the requirements of the contract, as clearly manifested by the invitation and bid, is to be found in the testimony of their sales manager Kornbacher. With refreshing candor he admitted that in a conversation with appellee Mezori, the general manager of all three concerns involved, the latter had revealed his intent to "deliver to the Army regulators assembled by him [and] *made to appear like the Delco-Remy model*" [emphasis supplied] (R. 169). Kornbacher then had suggested that Mezori inform the Army that "the original item we thought we were going to furnish * * * was not the item they desired" and ask it "to arrive at [a] decision in the matter" (R. 170). Mezori did not challenge the validity of this suggestion but, according to Kornbacher, nevertheless did not act upon it, *i.e.*, went ahead and furnished appellees' own regulators which had been made to appear as Delco-Remys without in any way advising the Army he was doing so (R. 170).

It is also highly significant that, in the certification accompanying each of the 17 invoices here involved, appellees on the one hand set forth *verbatim* that portion of the item description in the invitation referring to Delco-Remy regulators and on the other hand carefully refrained from use of the phrase "or equal".⁵ Again, it

⁵ The item description in the invitation was as follows (SR. 295):
Regulator, generator, Assy. Mfr's Part Nos. DR-1118502, GM-1118502, IHC-50301-R1, or equal. ORD-7069022, ORD-7069023. Ordnance Stock No. 2580-1118502. Vehicle Application SNL G541, G671, G506, G501, G508.

The description of the supplied item in the invoices submitted for payment by appellees read as follows (R. 103):

Regulator, generator, Assy. Mfr's Part Nos. DR-1118502, GM-1118502, IHC-50301-R1, ORD-7069022, ORD-7069023. Ordnance Stock No. 2580-1118502. Vehicle Application SNL G541, G671, G506, G501, G508.

is more than a fair inference that appellees adopted this consistent practice because they recognized that the Army would reject the shipment if it knew that the regulators were not Delco-Remys. At least, we have been unable to imagine any other possible reason and to date appellees have not suggested any.

Finally, and perhaps most revealing, is the testimony of Mezori himself. On cross examination, he conceded that he understood the contract called for the same item as he had delivered to the Government under a previous contract (R. 269). When asked whether the items shipped under that contract “[w]ere * * * regulators assembled by [him], or surplus regulators made by Delco-Remy,” Mezori reluctantly admitted (R. 270):

Regulators made by Delco-Remy, I believe.

3. The court below, totally ignoring these considerations, took the position that the Contracting Officer had “decided” that appellees’ regulators “complied in all respects with the contract” and that this “decision” was to be afforded conclusive effect (R. 53). In this connection, the court placed reliance on his October 16, 1950 letter (R. 53). We submit, however, that the letter, both when taken alone and when read in context, is not susceptible of any such interpretation.

At the outset, it is important to bear in mind the occasion for the Contracting Officer’s writing to appellees. Approximately one month before, on September 14, 1950, it had been called to his attention that the 4,086 regulators already delivered by appellees as Delco-Remys were not Delco-Remys despite their nameplates and that in reality they had been manufactured and assembled by appellees and their subcontractors

(R. 116). Upon learning this, the Contracting Officer had forthwith instructed the inspector not to accept any more regulators from appellees pending the conclusion of tests to determine how they compared with the Delco-Remy model (R. 117). This action left open the question as to whether the balance of appellees' regulators would be accepted by the Army. It was solely to this question that the Contracting Officer needed to, and did in fact, address himself when he wrote to appellees.

After a recitation of (1) the developments leading up to the contract, including appellees' offer in terms to furnish the Delco-Remy model and (2) the Army's discovery of the actual origin of the 4,086 regulators delivered, the Contracting Officer proceeded in his October 16 letter to consider whether in furnishing their own regulators appellees had complied with the contract as written. And, contrary to the belief of the court below, his conclusion was categorically in the negative (R. 117):

[In connection with the question of conformity with the requirements of the contract] your attention is directed to the fact that *in your bid you offered to furnish one of the approved items listed in the Invitation*, and that on page 1 of Schedule "A" of your bid you indicated by appropriate underscoring (a) that you were *not* a manufacturer of the articles quoted on and (b) that you *do* regularly carry a stock of such articles. This was construed to mean that you regularly carry a stock of genuine Delco-Remy Regulators, and since the Regulators tendered for acceptance bore a Delco-Remy name place, *it was assumed that they*

were the approved items upon which you bid. Also, the "SPECIAL CONDITIONS" which constitute a part of your bid established a procedure for qualifying "or equal" items, which had not been followed, thereby entitling the Government to cancel the contract for default pursuant to the provisions of the contract, should it elect to do so. (Emphasis supplied).

Having thus explicitly pointed out that the contract called for Delco-Remy regulators, the Contracting Officer then turned to the matter as to whether the balance of the regulators would nevertheless be accepted. No doubt influenced by the report to the effect that the regulator tested was equivalent to the Delco-Remy model, as well as by the outbreak of the Korean war and the consequential demand for military supplies of all kinds, the Contracting Officer advised appellees that the resident ordnance inspector had been instructed to take the remaining regulators on an "or equal" basis (R. 117).

The October 16 letter therefore constituted nothing more or less than a decision by the Contracting Officer that the contractual requirement that Delco-Remy regulators be furnished would be waived insofar as future deliveries were concerned. The Contracting Officer's authority to take such action being undisputed, the Government has never raised any question respecting appellees' post-October 16 delivery of non-Delco-Remy regulators or their claims for payment based thereon. The instant action is limited to the 4,086 regulators furnished prior to September 14, 1950, the date upon which appellees' deception came to light. We emphasize again that the Contracting Officer did not, and in the circum-

stances could not, decide that these items, falsely certified to be Delco-Remys, complied with the contract. And neither he nor anyone else purported at any time to waive the contractual specifications as to them.⁶

B. By Assembling Their Own Regulators For Delivery Under The Contract, Affixing Counterfeit Delco-Remy Nameplates To Them, And Representing To The Government That They Were Of Delco-Remy Manufacture, Appellees Became Liable For The Statutory Damages Provided In The False Claims Act.

In view of the foregoing, the situation in the final analysis comes down to this. Appellees contracted with the United States to furnish Delco-Remy regulators. Instead of endeavoring to comply with the contract, they assembled their own regulators, which differed in at least two material respects from the Delco-Remy, and delivered them to the Government. To conceal the substitution, a counterfeit of the Delco-Remy nameplate was surreptitiously obtained and attached to each regulator. And in each of the seventeen invoices, appellee described the item being supplied as a Delco-Remy regulator and certified that "all conditions of purchase have been complied with."

These considerations by themselves render appellees

⁶ Although neither appellees nor the court below placed reliance on the fact that the resident ordnance inspector certified on the invoices that the regulators "have been accepted as conforming to contract requirement," we note in passing that any such reliance would be totally misplaced. Leaving aside the question as to whether the ordnance inspector had the authority to bind the Government on matters of contract interpretation, his certification, as the record shows, stemmed from his belief, formed on the basis of the nameplates, that the items offered were Delco-Remy regulators (R. 200).

liable, at the very least, for \$2,000 on each invoice, as prescribed by the False Claims Act. Appellees can draw no comfort from the possibility that the contract in other circumstances might have been written to permit the delivery of regulators assembled by appellees themselves. Nor does the recovery of the statutory damages depend upon a showing by the Government that the supplied regulators were inferior to the Delco-Remy model they were purported to be.

1. In determining whether the invoices presented for payment were false, fictitious, or fraudulent, the single relevant consideration is that discussed above, namely whether the items delivered were those the contract specified were to be supplied and those represented by appellees to have been supplied. That it is of no consequence that, had appellees followed the procedure outlined in the invitation, the contract conceivably could have been entered into on the basis of the delivery of an "or equal" regulator is seen from the holding of the Fifth Circuit in a closely parallel case. *Faulk v. United States*, 198 F. 2d 169 (C.A. 5).

There, the defendant had contracted with the United States to supply "milk, *fresh*" in accordance with "Federal Specification No. C-M-381c, Type II, No. 2." In carrying out the contract, however, he supplied recombined milk instead; endeavoring to conceal this fact from the Government by [198 F. 2d at 173]:

* * * mislabeling the milk bottles so as to show that they contained "Grade A" milk when in fact he knew they contained "recombined milk", placing a few bottles of fresh milk in the rear of his delivery truck each day in order to deceive the Army veterinarian officer whose duty it was to

inspect the milk before consumption by the troops; preparing the recombined milk at night in order to deceive an inspector for the Air Force sent to the plant for inspection purposes, threatening some of his employees with physical violence if they exposed him, and finally delivering the recombined milk rather than the fresh milk called for by the contract and certifying in his claims that delivery was in accordance with specifications. * * *.

In its answer to the Government's complaint brought under the False Claims Act, the defendant set forth, by way of an affirmative defense, a Note to the above specification to the effect that Type II, No. 2, pasteurized milk referred to "the first quality pasteurized milk, other than certified, available in communities not formally operating under the United States Public Health Service Milk Ordinance and Code." His argument was that since the milk delivered came within this description it met federal specifications, with the result that the claims presented for payment were not "false, fictitious or fraudulent" within the meaning of the False Claims Act. It was also noted that, at an earlier date, the defendant had supplied recombined milk to the Government under a different contract.

The district court rejected this contention and entered judgment for the United States in the amount of \$2,000 for each of the five vouchers submitted for payment, plus double the amount of damages sustained by the Government. The court of appeals affirmed. Noting that the contract as written had been for the delivery of fresh milk, and that the defendant had certified that he had delivered fresh milk, the court held that in the circumstances it was entirely irrelevant that

the federal specifications mentioned in the contract may have also encompassed the recombined milk which had been in fact supplied [198 F. 2d 172].

The sound basis for this rule needs little elaboration. It is, of course, for the purchaser to decide what will serve his particular purposes and, when a contract is entered into calling for a particular item, he has the right to expect that the supplier will not later make an *ex parte* determination that a different item will do just as well. Further, and more important, the supplier who takes it upon himself to decide that the purchaser will be (or should be) satisfied by something other than that which had been agreed upon assuredly has no license to conceal the resultant breach of contract by deceiving the purchaser into believing that the contract item was being supplied. The short of the matter is that, no matter what the comparative merits of fresh and recombined milk and no matter what he had supplied under earlier contracts, the dairyman in the *Faulk* case, like appellees here, deliberately misrepresented a material fact when he placed false labels on the milk he furnished and then certified that the milk was fresh. And since in both instances the Government acted, as it was intended to, in reliance on the misrepresentation (by accepting the tendered items) the essential elements of fraud were present. See *Pence v. United States*, 316 U.S. 332, 338 and cases therein cited; cf. *United States ex rel Brensilber v. Bausch & Lomb Optical Co.*, 131 F. 2d 545 (C.A. 2), affirmed by an equally divided Court, 320 U.S. 711.

2. The Government's evidence below revealed that appellees' regulators offered as Delco-Remys not only differed from but were inferior to the Delco-Remy

model. The District Court first rejected this evidence altogether but later decided that it was admissible on the question of whether a false or fraudulent claim had been presented but not admissible on the question of inferiority (R. 249). The court then concluded that the Government had not been damaged by appellees' actions (R. 53).

We show in a subsequent part of the brief (pp. 31-35, *infra*) that the court below was in error in its view that the Government was foreclosed from proving the inferiority of appellees' regulators. But the plain fact is that, even had the Government made no endeavor at all to prove that the fraud had occasioned ascertainable damage, appellees would be liable for the statutory forfeitures. Whether and to what extent the United States is demonstrably damaged by reason of a false, fictitious or fraudulent claim is relevant only in respect to the other relief provided in the False Claims Act, namely the recovery of double damages.

This, we submit is clear from the pertinent terms of 31 U.S.C. 231, *infra*:

*Any person * * * who shall make * * * or present * * * for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, * * * any false * * * voucher, * * * claim, certificate, * * * knowing the same to contain any fraudulent or fictitious statement or entry, * * * shall forfeit and pay*

to the United States the sum of \$2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit. [Emphasis supplied]

Assuming, however, that there could have been at any time serious doubt that the recovery of the forfeiture does not depend on proof of actual damages, it was totally dispelled by the Supreme Court's decision in *United States ex rel Marcus v. Hess*, 317 U.S. 537 and the subsequent holding of the Third Circuit in *United States v. Rohleder*, 157 F. 2d 126.

In the *Hess* case, the contention was that the defendants had conspired to rig the bidding on the furnishing of electrical work on PWA projects, despite their certifications that the bidding had been competitive. After a jury verdict in favor of the plaintiff, the defendants moved for judgment n.o.v. or, in the alternative, a new trial. One of the grounds advanced in the motion was that the court had erred in failing to charge that "[t]here can be no recovery of any penalty or forfeiture on account of any project in which no actual damages have been shown" (41 F. Supp. 197, 218). The district court rejected this contention, observing that 31 U.S.C. 231

expressly provides for a penalty of \$2,000, "and, in addition, double the amount of damages which the United States may have sustained." This makes it plain that regardless of damages sustained, the United States would still be entitled to recover the penalty." [*Ibid*]

The judgment of the district court was reversed by the court of appeals on different grounds (127 F. 2d 233). In the Supreme Court, defendants renewed their contention respecting damages⁷ and the Supreme Court, in reversing the court of appeals and reinstating the district court judgment, rejected it summarily (317 U.S. at 552-553): "We have examined the other contentions of the [defendants] and approve of the disposition of them by the courts below." Defendants thereafter filed a petition for rehearing again urging, *inter alia*, that as to certain of the contracts involved no ascertainable damages were shown to have been suffered by the Government.⁸ Rehearing was denied, 318 U.S. 799.

The *Rohleder* case, *supra*, like *Marcus v. Hess*, involved the submission of non-competitive bids to the Government. The United States, seeking to recover the statutory forfeitures, offered no evidence of actual damages and the district court found as a fact that there had been no showing that the Government would have benefited financially had the bids submitted been genuine. The court nevertheless granted recovery of the statutory damages.

On appeal, the defendant asserted as its primary ground for reversal the failure of the Government to allege or prove actual damages. After a detailed review of the proceedings in *Marcus v. Hess*, the court of appeals rejected this assertion [157 F. 2d at 129]:

⁷ See Brief for Respondents in No. 173, October Term, 1942, *United States ex rel Marcus v. Hess*, pp. 103 et seq. Contended respondents: [p. 109] "If no damages have been proved, the judgment of the Circuit Court of Appeals should be affirmed."

⁸ See Respondents' Petition for Rehearing in No. 173, October Term, 1942, *United States ex rel Marcus v. Hess*, pp. 3 et seq.

In view of the attitude toward just such claims as are before us, by the Supreme Court in the Hess litigation, we conclude that [31 U. S. C. 231] permits recovery of a forfeiture thereunder without actual damage being proven.

While the matter may have little importance here, we think it should be noted that this does not lend support to the view of the court below, advanced in another connection, that the False Claims Act is "drastically penal" (R. 43). In *Marcus v. Hess, supra*, the Supreme Court was confronted with this precise contention and squarely held that the \$2,000 plus double damage provision of the Act was remedial and not penal. The Court referred to its earlier decision in *Helvering v. Mitchell*, 303 U. S. 391, where, in holding that the additional assessment of 50% imposed in the case of tax fraud was compensatory in nature, it had observed that [303 U. S. at 401]:

The remedial character of sanctions imposing additions to a tax has been made clear by this Court in passing upon similar legislation. They are provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud.

See also *United States v. Grannis*, 172 F. 2d 507 (C. A. 4). Cf. *Stockwell v. United States*, 13 Wall. 531, 547, 551.

What the statutory provision thus represents is liquidated damages for those losses sustained by the Government in connection with the particular fraud which are not readily susceptible of reduction to a monetary

equivalent and as to which the risk of uncertainty long has been regarded as on the wrongdoer. *Armory v. Delamine*, 1 Strange 506, 93 Eng. Rep. 664 (1722); *Bigelow v. RKO Radio Pictures*, 327 U. S. 251, 265. In the instant case, this would include the doubtless heavy, though difficult to measure, expenses incurred in ferretting out appellees' fraudulent use of the Delco-Remy nameplate.⁹

II

Assuming Recovery Of The Statutory Damages Is Dependent Upon A Showing That The Supplied Regulators Compared Unfavorably With The Genuine Delco-Remy, Such Showing Was Made Below And The District Court Erred In Rejecting It.

Even were this Court to hold, contrary to *Marcus v. Hess*, *supra*, that recovery of the \$2,000 statutory damages for each false and fraudulent certificate depended upon a showing that the regulators delivered were inferior to the Delco-Remys they were represented to be, the judgment below still must be reversed. The Government made an abundant showing, by competent evidence, that the supplied regulators compared unfavorably with the Delco-Remy in at least two important respects. And the refusal of the District Court to consider this evidence was based upon its misconception

⁹ While in *United States ex rel Brensilber v. Bausch & Lomb Optical Co.*, 131 F. 2d 545 (C.A. 2), affirmed by an equally divided Court, 320 U.S. 711, the Second Circuit stated that the False Claims Act is penal in nature, the actual holding in that case was that the possession of an unlawful monopoly of the market was not a "fraud" since the defendant had never expressly or impliedly represented to the contrary. This determination, affirmed by the Supreme Court, did not turn upon the False Claims Act being a penal statute. Further, the opinion of the Second Circuit was rendered prior to the Supreme Court's decision in *Marcus v. Hess*.

of the scope and effect of the Contracting Officer's letter of October 16, 1950.

1. The testimony of the Government's witnesses showed that appellees' regulators contained a hinge in their armature assembly which was made of steel or bronze (R. 143). In its regulators, however, Delco-Remy used a hinge made of bimetal (R. 223). The bimetal served to keep the voltage of the unit constant under all conditions; the voltage varies in regulators with non-bimetal hinges as much as 20% when the unit becomes heated through operation (R. 227). And, if the regulator does not maintain constant voltage, the battery of the vehicle will run down (R. 228). This in turn will result in the radio, lights and/or blower motors burning out (R. 227-229).

It was further shown that the insulating plates on appellees' regulators were made of a paper-based phenolic substance (R. 158-163). In its No. 1118502 regulator, designed for heavy military duty, Delco-Remy used linen-based insulation (R. 230-233). Although linen-based plates do not have superior insulating properties, they have much greater durability and will therefore stand much more abuse (R. 231).

2. Appellees, conceding their use of non-bimetal hinges and paper-based insulation (R. 238, 239), did not directly challenge the expert testimony that Delco-Remy used other and superior materials in its DR-1118502 regulator. Instead, they rested exclusively upon the test report that the supplied product and the genuine Delco-Remy "have similar characteristics and are interchangeable" and that a visual inspection revealed "no difference in construction, materials used, or methods of adjustment"; and the Contracting Officer's resulting acceptance of the balance of the regu-

lators. Reduced to essentials, appellees' argument, accepted by the District Court, was that no matter how erroneous or incomplete¹⁰ the test report may have been, the action taken by the Contracting Officer closed the door permanently and for all purposes to a demonstration that the 4,086 regulators in issue were inferior. In this connection, reliance was placed primarily on Article 14 of the contract.

Article 14 is the familiar "disputes clause" found in standard form Government contracts. It provides in material part that "all disputes concerning questions of fact which may arise under this contract" and which "are not disposed of by mutual agreement" are to be decided by the Contracting Officer, with a right of appeal by the contractor to the Department head (SR. 287). The latter's decision, or that of his designated representative, is to be final and conclusive (SR. 287).

Clauses such as Article 14 concededly attach finality to the Departmental determination of factual disputes, unless the determination "was founded on fraud, alleged and proved." *United States v. Wunderlich*, 342 U. S. 98, 100; *United States v. Moorman*, 338 U. S. 457; *United States v. Callahan Walker Constr. Co.*, 317 U. S. 56, 58; *United States v. McShain, Inc.*, 308 U. S. 512, 520; *Plumley v. United States*, 226 U. S. 545; *Sweeney v. United States*, 109 U. S. 618, 620; *Kihlberg v. United States*, 97 U. S. 398, 402. But in hold-

¹⁰ It should be observed that the test report on the basis of which the Contracting Officer acted (R. 124-125) does not reflect that the tested regulator was stripped down and each part examined. In the absence of such a procedure, the fact that the regulator had paper-based insulation plates would not be discovered. The operational test of course would not reveal the composition of the plates.

ing that the Contracting Officer's letter came within the ambit of Article 14, the District Court plainly ignored the fact that the operation of the finality provision in the Article in terms is limited to decisions resolving *disputes* of fact.

A dispute exists only where something asserted on one side is denied by the other. *Keith v. Levi*, 2 Fed. 743, 745 (C. C. W. D. Mo.); *In re Robinette*, 211 Minn. 223, 200 N. W. 798; *Black's Law Dictionary* (3rd Ed., 1933) p. 593. There can be a dispute only where there is controversy, disagreement, opposing contentions or argument to persuade the other side to change its position. *Miners' General Group v. Hix*, 123 W. Va. 637, 643-644, 17 S. E. 2d 810, 814; *Block Coal & Coke Co. v. United Mine Workers*, 177 Tenn. 247, 148 S. W. 2nd 364.

Wherein lay the controversy or disagreement preceding the Contracting Officer's October 16 letter? What were the opposing contentions on the part of appellees and the Government that were to be weighed by the Contracting Officer? When, prior to October 16, did appellees assert that their regulator was equal to the Delco-Remy? When did Ordnance assert to the contrary? In short, was the Contracting Officer called upon to resolve a *dispute* as to the equality of the two regulators and, if so, when and how did it arise?

We have earlier reviewed, in another connection, the setting of the October 16 letter. See pp. 19-21, *supra*. It was there noted that the Contracting Officer's action was not in response to conflicting assertions respecting the equivalence of the Delco-Remy and the 4,086 regulators previously delivered by appellees under the contract. Indeed, appellee hardly would have been in

a position to make any assertion at all in this regard in view of the fact that they had, in the first instance, certified that their regulators were genuine Delco-Remys and the Army had accepted them and paid for them on that basis.

What prompted the Contracting Officer's letter instead was the necessity of making a determination as to (1) whether the contract permitted the delivery of anything other than genuine Delco-Remys and (2) if not, whether the balance of the regulators appellees proposed to supply nevertheless would be accepted on an "or equal" basis. Respecting the first question, there was a dispute and it was unequivocally resolved against appellees. See *supra*, pp. 20-21. Insofar as the second question is concerned, however, there was, and could have been, no dispute. In the first place, the record does not indicate that any Army official or employee expressed any opinion at all on the quality of appellees' regulator prior to the Contracting Officer's receipt of the test report. Secondly, appellees were not entitled to be heard on the question whether the Government would accept further performance not in compliance with contractual specifications. The contract calling for genuine Delco-Remys "without substitution of any kind," it was for the Government to decide unilaterally whether appellees' locally assembled regulators sufficiently approximated the Delco-Remy to warrant a waiver of the contract as to the remaining regulators. It is obvious, of course, that there can be no dispute between parties to a contract over a matter in which one of them has no voice.

Thus the Contracting Officer plainly was not acting under Article 14 when he decided to accept further shipments of appellees' nonconforming regulators on

an "or equal" basis. While this, we submit, is fully dispositive of the finality question, there are still other and independent reasons why the letter did not foreclose the showing of inferiority made by the Government below.

For one thing, this showing, it is to be stressed again, was made in connection with the 4086 regulators already delivered to and accepted and paid for by the Army as being of Delco-Remy manufacture. Even had there been a dispute as to their quality, within the meaning of Article 14, the Contracting Officer did not purport to resolve it. As we have seen, his concern was simply with the quality of the remaining regulators, which as of that time were still undelivered and unpaid for.

Additionally, unlike *Wunderlich* and the earlier cases construing the disputes clause, this action was not brought on the contract and does not pertain to monies under the contract. This is instead an action for fraud, growing out of the deliberate misrepresentations by appellees regarding the origin and composition of the items delivered. There is nothing in the *Wunderlich* line of cases to indicate that Article 14 is applicable in suits of this character. And, it being settled that no Government official may dispense with the requirements of law or relinquish rights of the United States without clear warrant from Congress,¹¹ no action taken by the Contracting Officer can have the effect of waiving the right bestowed upon the United States by the False Claims Act to recover damages for fraud.¹²

¹¹ See *e.g.*, *Hart v. United States*, 95 U.S. 316, 318; *Munro v. United States*, 303 U.S. 36, 41; *Case v. Terrell*, 11 Wall 199, 203.

¹² The court below also made reference to 41 U.S.C. 1-260 (R. 53). But while the contract was entered into pursuant to the Armed Services Procurement Act of 1947, 62 Stat. 21, 41 U.S.C.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed.

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JULY, 1955

151-161 (SR. 286), we see nothing therein that possibly could be read as precluding the Government from demonstrating the inferiority of appellees' regulators.

The relevant provisions of the False Claims Act, revised statutes 3490-3492, 5438, 31 U. S. C. 231-233 are as follows:

[31 U. S. C. 231]

Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall make or cause to be made, or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, or who, having charge, possession, custody or control of any money or other public property used or to be used in the military or naval service, who with intent to defraud the United States or willfully to conceal such money or other property, delivers or causes to be delivered, to any other person having authority to receive the same, any amount of

such money or other property less than that for which he received a certificate or took a receipt, and every person authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other property so used or to be used, who makes or delivers the same to any other person without a full knowledge of the truth of the facts stated therein, and with intent to defraud the United States, and every person who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, officer, sailor, or other person called into or employed in the military or naval service any arms, equipments, ammunition, clothes, military stores, or other public property, such soldier, sailor, officer, or other person not having the lawful right to pledge or sell the same, shall forfeit and pay to the United States the sum of \$2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit.

[31 U. S. C. 232]

(A) The several district courts of the United States, the several district courts of the Territories of the United States, within whose jurisdictional limits the person doing or committing such act shall be found, shall wheresoever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit.

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[31 U. S. C. 233]

It shall be the duty of the several United States attorneys for the respective districts, for the District of Columbia, and for the several Territories, to be diligent in inquiring into any violation of the provisions of section 231 of this title by persons liable to such suit, and found within their respective districts or Territories, and to cause them to be proceeded against in due form of law for the recovery of such forfeiture and damages. And such person may be arrested and held to bail in such sum as the district judge may order, not exceeding the sum of \$2,000, and twice the amount of the damages sworn to in the affidavit of the person bringing the suit.



No. 14692.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

NATIONAL WHOLESALERS, a corporation; M-D PARTS
MANUFACTURING COMPANY; NATIONAL PARTS COM-
PANY, and HENRY MEZORI,

Appellees.

APPELLEES' BRIEF.

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PANY, and HENRY MEZORI,

Appellees.

APPELLEES' BRIEF.

Preliminary Statement.

This case was tried without a jury before the United States District Court for the Southern District of California, Central Division. On December 1, 1954, the District Court filed its opinion and order for findings of fact, conclusions of law and judgment dismissing the Government's complaint. [R. 42-46.] The opinion of the District Court is reported. (126 Fed. Supp. 357.) Findings of fact, conclusions of law and judgment were signed and filed by the District Court December 16, 1954. [R. 46-54.] The District Court by reference made its opinion a part of its findings of fact. [Find., Par. XI, R. 52.]

The appellant's statement of the case (Appellant's Br. pp. 1-9) is contested by appellees. Appellant has not, as

required by the rules of this Court, *Paragraph 2(c) of Rule 18*, presented in its statement of the case the questions involved on this appeal or the manner in which they were raised. Because of that omission and the substantial inaccuracies in the facts related, appellees will, pursuant to *Paragraph 3 of Rule 18*, make a statement of the case; but before doing so appellees feel that they should invite this Court's attention to the scurrilous, scandalous and impertinent character of appellant's brief.

Appellant's Brief Should Be Stricken.

Appellant's brief contains numerous statements, wholly aside from the facts shown by the record, bearing reproachfully upon the moral character of the appellees and reflecting upon the judicial integrity of the lower court, which are clearly impertinent and scandalous, and unfit to be submitted to this Court. The appellant's brief should be stricken.

Green v. Elbert, 137 U. S. 615, 11 S. Ct. 188 (1891);

Davidge v. Simmons, 266 Fed. 1018 (1920), cert. den. 257 U. S. 667, 42 S. Ct. 184.

There is nothing in the record to support the baseless charges made at pages 11 and 12 of appellant's brief that the "undisputed facts in the record" show a deliberate course of conduct on the part of the appellees calculated to defraud the United States in the procurement of war material. In the course of Counsel's tirade appellees are called "defrauders" and "counterfeiters," names which should be used sparingly, even if there were some support in the record for such name calling; here there is none. No reference is made to the record and none can be made in support of the untrue statements of Counsel that the

“undisputed facts in the record” establish that the appellees are “defrauders” and “counterfeiters.”

A far more serious charge than Counsels’ indictment of the appellees is their unwarranted attack upon the District Court, impugning its honesty of purpose, impartiality and fairness in the rulings made during the trial. Counsel say, at pages 11 and 12 of appellant’s brief:

“Notwithstanding appellees’ complete and shocking disregard of basic and ordinary standards of honesty, the court below has ruled that their scheme to pass off their regulators as Delco-Remys does not come within the purview of the False Claims Act.”

There can be no excuse for Counsel’s attack on the District Court. The attack appears to have been deliberately made from the halls of the Department of Justice at Washington; among those signing the brief is Warren E. Burger, Assistant Attorney General. It is probable that none other than a Government attorney would have made such an attack upon the lower court. The brief may be stricken by this Court on its own motion, if the Court be so advised.

Anderson v. Federal Cartridge Corp. (C. A. 8), 156 F. 2d 681 (1946), and the cases cited in support of the rule at page 686 of the Opinion.

The motive for the impertinent, scurrilous and scandalous brief of appellant may be found in Counsel taking the side of big business in its attempt to allocate to itself all contracts with the Armed Services for supplies and materials in frustration of the declared policy of The Congress “that a fair proportion of the total purchases of, and contracts and services for, the Government shall be placed with small business concerns.” (41 U. S. C., Sec. 151(b).) The appellees singly and collectively con-

stitute a small business. It is known to everyone that General Motors, of which Delco-Remy is a division, is by far the largest contractor with the Armed Services for the supply of war materials. Counsel describe contract No. DA-20-018-ORD-3951 as being "in the vital area of the procurement of war materiel" for the United States. (Appellant's Br. p. 11.)

Counsel apparently take the side of big business in the contest between little business with big business for a fair share of defense contracts. No other construction may be given to the following statement on page 17 of appellant's brief:

"But appellees could not have failed to recognize that, despite all such precautions, their unauthorized and improper use of the Delco-Remy name might come to light, leaving them open to the risk of having to pay heavy damages to General Motors for unfair competition and perhaps for trade-mark infringement as well."

Counsel's gratuitous solicitude for the general welfare of General Motors reveals that the objective of the Department of Justice in the prosecution of this suit may be to put small business competitors of General Motors out of the running for defense contracts. Appellees believe that General Motors, with the advice of its batteries of competent counsel, is now and has been able to determine, without the aid of the Department of Justice, whether or not it has been the victim of unfair competition or trademark infringement. The statutes of limitation have now run on all such suits as those proposed by Counsel on behalf of General Motors.

There is nothing in the record to support the threat of a suit by General Motors. The other 20 bids on the regu-

lators were high, so the contract was awarded to appellee, National Wholesalers, the lowest bidder. [S. R. 285.] The item description of the regulator in the contract [S. R. 295] was found by the District Court to “serve, instead of a lengthy recital of specifications, as a brief shorthand alternative description of the actual physical regulator contracted for” (126 Fed. Supp. 357, (2), (7), (8)) to “indicate the type or model, design and composition of the regulator contracted for.” [Find. XI, R. 52.] The Court also found [Find. IX, R. 51] “that the regulators delivered to the Government by the defendants were for exclusive Army use. The regulator is not and never has been a patented article. It has never been sold to the public by Delco-Remy or anyone else.” It was stipulated in the pre-trial stipulation [R. 33] that the regulators delivered to the Government by appellees “did not have the trademark or serial number of Delco-Remy imprinted on them.” Counsel have in no way attacked those findings of fact. Counsel’s attempt to make General Motors an invisible party to this action shows a further lack of merit in the appeal and may move this Court to order the brief stricken because of the intimidation aspects of a suggested suit by General Motors against appellees.

Appellees’ Statement of the Case.

The complaint, filed July 3, 1953 [R. 3-10], sought the recovery from the defendants of penalties for alleged false claims against the Government under 31 U. S. C., Sections 231, 232, 233. (126 Fed. Supp. 357.) There is no specific allegation in the complaint that the Government suffered any damage. The complaint is based solely on the theory that the Government was entitled to recover a \$2,000.00 penalty for each of the certificates made by the

contractor on the invoices [Pltf. Ex. 1, R. 103] for the payment to the contractor of the purchase price of \$23.50 each for the 6600 voltage regulators,¹ or \$155,100.00 in all, as the regulators were delivered to Army Ordnance at the times required by contract No. DA-20-018-ORD-3951, dated April 1, 1950. [S. R. 285-295.] The complaint alleged that the contract required the defendants to deliver to the Government genuine Delco-Remy regulators and that the defendants conspired to deliver, and did deliver, 6600 inferior regulators of their own manufacture and assembly instead of the genuine Delco-Remy regulator which it is alleged the contract required to be delivered.

In their answer [R. 12-17] the defendants denied the fraud and conspiracy alleged in the complaint. The defendants alleged by way of separate defense [R. 13-17] that the 6600 regulators delivered to the Government were the exact regulators contracted to be delivered and that they complied in all respects with the specifications of contract No. DA-20-018-ORD-3951. The answer alleged a dispute between Army Ordnance and the defendants, which dispute arose after 4086 of the regulators had been delivered, as to whether or not the regulators already delivered were the regulators called for by the contract. The answer alleged that Army Ordnance resolved the dispute by testing the regulator already delivered from which test it was found by Ordnance that the regulator complied in every respect with the specifications of the contract.

¹A voltage regulator is a governor controlling the amount or rate of flow of the electric current from the generator to the storage battery. The radio, lights, and other electrically operated units of a motor vehicle run off the battery. The regulator controls the flow of the current from the generator to the battery so that the battery charge will not fall too low or rise too high.

Based on the test [Deft. Ex. B, R. 124-125], the duly authorized contracting officer for Army Ordnance made a written decision [Deft. Ex. A, R. 115-118] that the regulators already delivered qualified under the contract as "or equals" and directed the defendants to deliver the balance remaining of 2514 regulators, which was done.

Each of the 6600 regulators were inspected and accepted by Ordnance and certified by the resident inspector for Ordnance as "conforming to contract requirements" [R. 34]; and the full purchase price for the 6600 regulators of \$155,100.00 was paid by the Government to appellee, National Wholesalers. Not one of the 6600 regulators was rejected by Ordnance. [R. 249-250.] The decision of the contracting officer was made under Chapter 3 of the *Public Contracts Law, Procurement of Supplies and Services by the Armed Services*, 41 U. S. C., Sections 151-161, and pursuant to paragraph 14 of the contract. [S. R. 287.] The Government concedes the authority of the contracting officer to make the decision. (Appellant's Br. p. 21.)

Pursuant to the pre-trial order of the lower court extensive pre-trial proceedings were had. [R. 17-42 and 56-97.] The pre-trial stipulation [R. 30-37] disposed of all of the issues raised by the complaint and answer, except the questions of conspiracy, fraud and damages. [R. 36.] In response to those issues the District Court found [R. 50-52] that the defendants did not conspire to make or present, nor did they or any of them make or present any false claims, certificates, invoices, vouchers or accounts as alleged in the complaint, or otherwise; and that the Government had not been damaged. From the facts so found, the Court concluded [R. 52-53] as a matter of law that there being no fraud, the plaintiff's complaint should be dismissed.

ARGUMENT.

I.

The Finding of No Fraud Ends the Government's Case.

The crux of an action brought under Section 231, 31 U. S. C., is whether or not the claims presented were false. The District Court found [Find. VII, VIII and IX, R. 50-51] that the claims presented were not false, fraudulent, or fictitious. It really would not matter if there was no other finding in the case except that the claims presented were not false. The case stops at that point.

The statute, Section 231, 31 U. S. C., only applies where a person presents a claim to the Government, knowing such claim to be false, fictitious or fraudulent. The rule is that the statute makes "fraud of some sort the basis of the liability, and uses the word in its accepted sense of deceit, as appears from the juxtaposition of the three adjectives "false," "fictitious" and "fraudulent."

United States ex rel. Brensilber, et al. v. Bausch & Lomb Optical Co., et al. (C. A. 2), 131 F. 2d 545, 546 (1942), aff'd, 320 U. S. 711, 64 S. Ct. 187 (1943), reh. den., 320 U. S. 814, 64 S. Ct. 256 (1943).

To prevail in an action under Section 231, the United States must prove fraud of some sort. "Fraud implies a misrepresentation of a material fact, either express or implied."

United States v. Bressler (C. A. 2), 160 F. 2d 403, 405 (1947).

The record here is bare of any misrepresentation made by appellees. The complaint does not allege that any mis-

representations were made by appellees; nor does the record reveal that the Government offered any evidence that the appellees, or any one of them, made any misrepresentations.

An ordinary complaint in the Federal Courts can now be quite simple. A detailed statement of the case in a complaint is no longer necessary except where the cause of action is based on fraud or mistake; the facts constituting fraud or mistake must be alleged with particularity.

“In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.”

Fed. Rules Civ. Proc., Rule 9(b).

Fraud must be specifically alleged and proved; it is never presumed.

United States v. Wunderlich, 342 U. S. 98, 100, 72 S. Ct. 154, 155 (1951);

United States v. Colorado Anthracite Co., 225 U. S. 219, 226, 32 S. Ct. 617, 620 (1912).

The certificates on the invoices are alleged in the complaint to be false and fictitious because it is claimed that the defendants did not deliver to the Government genuine Delco-Remy voltage regulators known as Delco-Remy parts No. DR-1118502, but substituted other and inferior voltage regulators and parts of their own assembly and manufacture. [Comp., Pars. XIII-XIV, R. 8-9.] The purported allegation of fraud in the complaint is insufficient. “Inferior” is a mere conclusion of law. The allegation of fraud does not meet the requirement of *Rule 9(b) of Federal Rules of Civil Procedure*, nor the cases

here cited. The complaint wholly fails to state a cause of action under Section 231, of 31 U. S. C.

More important than any question of pleading is that after about 60% of the 6600 regulators had been delivered, Army Ordnance found [Deft. Ex. B, R. 123-125], and so notified appellees, that the regulators already delivered by appellees to the Government were not only not inferior to the genuine Delco-Remy regulator, but were exactly the same as to quality, appearance, performance, tolerance, construction, and materials used, and that the characteristics of the two regulators were similar and that they were interchangeable. [Find. IV, R. 48-49.]

One of the leading cases on the subject of how to plead and prove fraud so as to make a case under Section 231, 31 U. S. C., is *United States v. U. S. Cartridge Co.* (E. D. Mo.), 95 Fed. Supp. 384 (1950), aff'd (C. A. 8), 198 F. 2d 456 (1952), cert. den., 345 U. S. 910, 73 S. Ct. 645 (1953).

In that case the District Court held, in a 43-page opinion, that the only fraud which will sustain an action under Section 231, 31 U. S. C., is fraud in connection with the making of a claim against the Government. At pages 394, 395, and 396 of the opinion in 95 Fed. Supp., what is necessary to state a case of fraud under Section 231, 31 U. S. C., and to prove fraud is learnedly discussed in great detail.

In the present case the Government alleged that the regulators delivered were inferior simply because they were not of Delco-Remy manufacture. The making of inferior war material, which fails to measure up to the standard provided in the contract, does not authorize

an action for recovery of the penalties or damages provided in Section 231, 31 U. S. C.

Hillgrove v. Wright Aeronautical Corp. (C. A. 6),
146 F. 2d 621, 622 (1945);

United States v. U. S. Cartridge Co., *supra*.

No amount of piling up in the appellant's brief of adjectives such as "false," "fictitious," "fraudulent," "shocking," "counterfeit," and "inferior" will suffice to meet the requirements of pleading and proof necessary to make a case of fraud under Section 231, or any other case of fraud.

The Supreme Court had occasion to discuss in *United States v. Wunderlich*, 342 U. S. 98, 72 S. Ct. 154 (1951), the necessity for specifically alleging and proving fraud in an action involving the finality of a contracting officer's decision made under a dispute clause in the exact language of paragraph 14 of the contract here. [S. R. 287.] The Supreme Court said on the subject, at page 100 of the opinion:

"In *Ripley v. United States*, 223 U. S. 695, 704, 750, 32 S. Ct. 352, 356, 56 L. Ed. 614, gross mistake implying bad faith is equated to 'fraud.' Despite the fact that other words such as 'negligence,' 'incompetence,' 'capriciousness,' and 'arbitrary' have been used in the course of the opinion, *this Court has consistently upheld the finality of the department head's decision unless it was founded on fraud, alleged and proved.* So fraud is in essence the exception. By fraud we mean conscious wrong-doing, an intention to cheat or be dishonest. *The decision of the department head, absent fraudulent conduct, must stand under the plain meaning of the contract.*

"If the decision of the department head under Article 15 is to *be said aside for fraud, fraud should be alleged and proved, as it is never presumed, United States v. Colorado Anthracite Co., 225 U. S. 219, 226, 32 S. Ct. 617, 620, 56 L. Ed. 1063.* In the case at bar, there was no allegation of fraud. There was no finding of fraud nor request for such a finding. *The finding of the Court of Claims was that the decision of the department head was 'arbitrary,' 'capricious,' and 'grossly erroneous.'* But these words are not the equivalent of fraud, the exception which this Court has heretofore laid down and to which it now adheres without qualification." (Emphasis ours.)

The nature, character and purpose of an action brought under Section 231, 31 U. S. C., is well illustrated in *United States ex rel. Marcus v. Hess, et al., 317 U. S. 537, 63 S. Ct. 379 (Jan. 18, 1943)*, a case strongly relied upon by the Government here and in the lower court. In that case the defendants had been, prior to the filing of the civil complaint, indicted under the criminal provisions of the False Claims Act. They had pled *nolo contendere* and were fined \$54,000. Action was then brought by an informer to recover the penalties and damages provided in Section 231, 31 U. S. C. The defendants interposed the defense of double jeopardy and that the informer had procured his information for the civil action from the criminal files in which the defendants had pled *nolo contendere* and been fined.

The Supreme Court rejected both defenses and stated, at pages 551-552 of the opinion, that the chief purpose of the civil action was to recover the money which the Government had lost by reason of the fraud of the

defendants. The Supreme Court said, at pages 551-552 of the opinion:

“We think the chief purpose of the statutes here was to *provide for restitution to the government of money taken from it by fraud*, and that the device of double damages plus a specific sum was chosen to make sure that *the government would be made completely whole.*” (Emphasis ours.)

The facts in the *Hess* case showed that the bidders had all agreed that defendant Hess, one of their number, should get the contract. Hess was to put in a bid in an amount agreed to by all, which the others were to top so that their bids would inevitably be rejected. Rigging the bidding in the manner in which it was done was a gross fraud upon the United States which caused the Government to suffer a large amount of damages. Mr. Justice Black held that the Government was entitled to restitution of the money so taken from it by fraud.

The *Hess* case is strongly in favor of the appellees because here no money has been taken from the Government by fraud. The Government got the exact regulator it contracted to buy. It paid the purchase price after inspection and acceptance of the regulators. Not one of the 6600 regulators was rejected, nor was any one of them returned as being inferior or not in compliance with the contract. [Find. IV, R. 48-49.]

A presumption of correctness attaches to the findings of the District Court that the claims presented to the Government for payment were neither false, fraudulent nor fictitious, and that the regulator delivered complied in all respects with the contract.

Paramount Pest Control Service v. Brewer (C. A. 9), 177 F. 2d 564, 567 (1949).

There is not one word of testimony in the record tending to show that the certificates on the invoices were false, fraudulent or fictitious, or that the appellees or any one of them made any false representations of any kind. It was incumbent upon the Government to produce evidence that the certificates were fraudulent. Its failure to do so brought this case to an end in the District Court by the dismissal of the Government's complaint. This Court has held over and over again that it will not disturb findings of fact made by the lower court based, as these are here, on substantial evidence, even though there may be some conflict in the testimony. One of the most recent of these cases is *Carr v. Yokohama Specie Bank, Ltd.* (C. A. 9), 200 F. 2d 251, 254-255 (1952), where the Court said:

“And the federal rule relating to findings of a trial court does not require the court to make findings on all facts presented or to make detailed evidentiary findings; if the findings are sufficient to support the ultimate conclusion of the court they are sufficient. *Norwich Union Indemnity Co. v. Haas*, 7 Cir., 179 F. 2d 827, 832. Nor is it necessary that the trial court make findings asserting the negative of each issue of fact raised. It is sufficient if the special affirmative facts found by the court, construed as a whole, negative each rejected contention. The ultimate test as to the adequacy of findings will always be whether they are sufficiently comprehensive and pertinent to the issues to provide a basis for decision and whether they are supported by the evidence. *Schilling v. Schwitzer-Cummins Co.*, 79 U. S. App. D. C. 20, 142 F. 2d 82, 84. And see *Woods v. Oak Park Chateau Corp.*, 7 Cir., 179 F. 2d 611; *Shapiro v. Rubens*, 7 Cir., 166 F. 2d 659; *cf. Life Savers Corp. v. Curtiss Candy Co.*, 7 Cir., 182

F. 2d 4; Skelly Oil Co. v. Holloway, 8 Cir., 171 F. 2d 670, 672-673.

“Where there is, as here, a conflict in the evidence it becomes the duty of the trial court to appraise all facts adduced in proof and it is not clearly erroneous for that court to choose between two permissible and conflicting views as to the weight of the evidence. Bjornson v. Alaska S. S. Co., 9 Cir., 193 F. 2d 433. We may not disturb such a choice by the trier of the facts. On the record made in this case we must and do conclude that the findings of fact are not clearly erroneous.”

The rule is even more rigid when applied to the findings of the District Court to a case brought by the Government under Section 231, 31 U. S. C. for the statute “is not only penal but diastically penal” and for that “reason it has been strictly construed.”

United States ex rel. Brensilber v. Bausch & Lomb Optical Co. (C. A. 2), 131 F. 2d 545, 547 (1942), aff’d (Nov. 8, 1943), 320 U. S. 711, 64 S. Ct. 187, Reh. den. (Dec. 6, 1943), 320 U. S. 814, 64 S. Ct. 256.

II.

There Is No Merit in the Government’s Appeal.

The *Brensilber* case, *supra*, contains the latest expression of the Supreme Court on the nature and character of an action brought under Section 321, 31 U. S. C.

Fraud is the basis of an action brought by the Government to recover the penalties and damages provided in Section 231, 31 U. S. C. Where the District Court has found, as it did here on competent evidence, that there was no fraud committed by the contractor either in the

bidding or in the performance of the contract, the appeal should be dismissed for failure of the record to present an issue of law which an Appellate Court may consider and decide.

Central Steel Tube Co. v. Herzog (C. A. 8), 203 F. 2d 544, 546 (1953);

Empire District Electric Co. v. Rupert (C. A. 8), 199 F. 2d 941 (1952);

Maryland Casualty Co. v. Independent Metal Products Co. (C. A. 8), 203 F. 2d 838, 841 (1953);

Clarke Hybrid Corn Co. v. Stratton Grain Co. (C. A. 8), 214 F. 2d 7, 9 (1954).

III.

The Government Is Precluded From Maintaining This Action by the Decision of Army Ordnance Finding as a Fact That the Regulators Delivered Were the Regulators Contracted for and That They Complied in All Respects With the Specifications of the Contract.

Contract No. DA-20-018-ORD-3951 recites that "this contract is authorized under the authority of the Armed Services Procurement Act of 1947, Public Law, No. 413, 80th Congress, 41 U. S. C. A. 151-161." [S. R. 286.] The contract was advertised, pursuant to Section 151(c), 41 U. S. C., by circular letter sent to 56 approved dealers, of whom appellee, National Wholesalers, was one. Twenty-one bids were received. The bid of appellee, National Wholesalers, was the lowest. The bid of National Wholesalers was accepted April 1, 1950, and this contract ensued. The contract [S. R. 285-295] was on WD Form 106 with Schedule "A" and conditions at-

tached. [Find. XI, R. 52.] The Army was given authority by Section 153(a), 41 U. S. C. to make the form of the contract of any type which in the opinion of the Secretary of War would "promote the best interests of the Government." One of the conditions of the contract to which the contractor had to submit was paragraph 14 [S. R. 287] which is as follows:

"14. DISPUTES.—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact which may arise under this contract, and which are not disposed of by mutual agreement, shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail a copy thereof to the Contractor. Within 30 days from said mailing the Contractor may appeal to the Secretary of War, whose decision or that of his designated representative, representatives, or board shall be final and conclusive upon the parties hereto. Pending decision of a dispute hereunder the Contractor shall diligently proceed with the performance of this contract."

Section 156, 41 U. S. C., gives the Secretary of War or his delegated representatives complete authority to make final decisions in all matters pertaining to procurement and the performance of contracts made as this one was pursuant to *Armed Services Procurement Act* of 1947. [S. R. 286.] The Secretary of War, as he was authorized to do by Section 153(a), 41 U. S. C., chose to insert Paragraph 14 in the contract as the method to be used for making the final decisions he is authorized to make by Section 156(a).

The determinations of Army Ordinance, whose authority to make decisions is conceded by the Government, that

the entire 6600 regulators delivered to the Government were the regulators contracted to be delivered by appellees and that all of the regulators complied strictly with the specifications of the contract, were determinations of fact which erase the Government's case. "The correctness of the Secretary's determination is not open to attack on judicial review."

De Cambra v. Rogers, 189 U. S. 119, 23 S. Ct. 519, 520-521 (1903);

Wann v. Ickes, Secretary of the Interior (C. A. D. C.), 92 F. 2d 215, 217 (1937);

Standard Oil Co. of California, v. United States (C. A. 9), 107 F. 2d 402, 422 (1940);

Estes v. Timmons, 199 U. S. 391, 26 S. Ct. 85, 86 (1905);

Whitcomb v. White, 214 U. S. 15, 29 S. Ct. 599, 600 (1909);

United States v. Binghampton Construction Co., 347 U. S. 171, 177, 74 S. Ct. 438, 441 (1954, citing Public Contracts Law, 41 U. S. C., Sec. 35 *et seq.*);

Friend v. Lee, Adm'r., Civil Aeronautics Administration (C. A. D. C.), 221 F. 2d 96, 100 (1955).

The standard dispute clause, quoted above [Par. 14, S. R. 287], is prescribed by The Congress for Government contracts. (41 U. S. C., *Appendix*, Secs. 54.1 and 54.13, *Art. 15.*)

The settlement of a dispute by the Secretary or his authorized representative under such a dispute clause cannot be attacked by the Government without pleading and proving fraud on the part of the officer making the

decision. The complaint alleged no fraud on the part of the contracting officer. His authority is conceded by the Government.

Kihlberg v. United States, 97 U. S. 398, 24 L. Ed. 1106 (1878);

United States v. Moorman, 338 U. S. 457, 70 S. Ct. 288 (1950);

United States v. Wunderlich, 342 U. S. 98, 100, 72 S. Ct. 154, 155 (1951);

Sunroc Refrigeration Co. v. United States (D. C. E. D. Penn.), 104 Fed. Supp. 131 (1952).

The United States cannot attack administratively or judicially the determination of a question of fact by the head of an executive department or his delegated representative.

United States v. Bucher (C. A. 8), 15 F. 2d 783, 786 (1926);

National Labor Relations Board v. Air Associates (C. A. 2), 121 F. 2d 586, 590 (1941);

United Foundations Corp. v. United States (Ct. Cl.), 127 Fed. Supp. 798 (1955);

Johnson Contracting Corp. v. United States (Ct. Cl.), 119 Fed. Supp. 788, 792 (1954);

Brown & Root v. United States (Ct. Cl.), 116 Fed. Supp. 732, 739 (1953).

The Government's position is murky. It concedes the authority of the contracting officer to make and to modify the contract. The clouded reasoning in which Counsel indulge, attempting to show that the qualification of the regulator as an "or equal" had no application to the 4086 regulators already delivered but applied to the 2514 to

be delivered, is beyond comprehension, as is the claim of Counsel that the procedure for qualifying the regulator as an "or equal" [S. R. 292] was of importance because not followed in the beginning. The contracting officer understood that the *Special Condition* for qualifying the regulator as an "or equal" was a matter of procedure only and waived it. [R. 117; Appellant's Br. pp. 20-21.] It was stipulated by the Government that the regulators already delivered were qualified by the contracting officer's decision [R. 115-118] as "or equals," and that the contracting officer had the right to so change or modify the contract. [R. 77-96 and 114-115.] And again at page 118 of the Record, Counsel for the Government, Mr. Weisz, made the following concession:

"Mr. Weisz: If the court would care to have the Contracting Officer called, he is present in the courtroom.

The Court: That is the Contracting Officer's letter of what date, now? Let's have it described in the record.

Mr. Neblett: October 16, 1950.

The Court: October 16, 1950. Now, does the Government propose to impeach that determination?

Mr. Weisz: Your Honor, the Government does not propose to impeach the determination, as such. The Government is in no position to do anything about it. The Contracting Officer had a right to qualify that regulator as 'or equal.' "

Findings III, IV, V and VI [R. 48-50], which are not attacked by the Government are in strict accord with

the concessions and stipulations made by the Government in the District Court.

A large part of the Government's Brief is devoted to Assignment of Error, Number 7 (Appellant's Br. p. 10), where it is asserted that the Court erred in excluding the Government's offer of proof that the regulators delivered were inferior to the one contracted to be delivered. Appellees feel that this Court will refuse to consider Assignment of Error Number 7 to which appellant devotes about half its argument. The appellant has failed to comply with Rule 18(d) of this Court, the applicable part of which is as follows:

"18(d) In all cases a specification of errors relied upon which shall be numbered and shall set out separately and particularly each error intended to be urged. *When the error alleged is to the admission or rejection of evidence the specification shall quote the grounds urged at the trial for the objection and the full substance of the evidence admitted or rejected, and refer to the page number in the printed or typewritten transcript where the same may be found.*"

It is obvious why appellant failed to comply with Rule 18(d); it could not do so without running into the concessions, stipulations, and findings cited above, which show that the Government has never had even the semblance of case under Section 231, 31 U. S. C.

IV.

**Neither the Suit in the District Court nor This Appeal
Was or Is Being Prosecuted in Good Faith.**

We challenge the good faith of the Department of Justice in bringing the suit and in prosecuting this appeal. When the suit was filed, July 3, 1953, the Department of Justice had for seventy-five years successfully defended in the Courts the decisions of a department head or his authorized representative in favor of the Government. (See *Kihlberg v. United States*, 97 U. S. 398, 24 L. Ed. 706 (1878), and *United States v. Wunderlich*, 342 U. S. 98, 72 S. Ct. 154 (1951).) Although the Department of Justice had full knowledge of the dispute and the settlement of it by Ordinance, [Deft. Ex. C; R. 259] the Government filed its complaint three years after the settlement was made. The complaint [R. 3-9] is bare of any reference to the settlement. Fairness to the appellees should have required the Department of Justice to refrain from bringing the suit; but if brought, fairness to the appellees should have compelled the Government to allege the settlement of the dispute by Ordinance and then to attack the settlement in the only way possible by alleging fraud on the part of the Army officers who made it.

United States v. Wunderlich, supra.

Without alleging fraud on the part of the Army Ordinance officers who made the tests of the regulator and rendered the decision that the regulator complied with the contract, the charge in the complaint was an empty one partaking of the extortion features condemned by the Court of Appeals of the Second Circuit in *United States ex rel. Brensilber v. Bausch & Lomb Optical Co.*, *supra*, affirmed by the Supreme Court, 320 U. S. 711,

64 S. Ct. 187 (1943). In that case the Court said, 131 F. 2d 545, 547, that:

“The motion for summary judgment dismissing both (complaints) was right because it appears beyond question that the supposed liability arose from the offense for which Bausch & Lomb were indicted and to which they pleaded *nolo contendere*, and that this in turn rested upon the contracts. No testimony was necessary or indeed relevant to the issues so arising. *To subject the defendants to a long harassment by examination and trial upon a certainly empty charge could serve no purpose except possibly to force them to buy their peace, an extortion against which 31 U. S. C. A. Sec. 232 would not protect them.* The action is of precisely the sort which a motion for summary judgment was intended to nip in the bud.” (Emphasis ours.)

For the same reasons as those challenging the Department of Justice’s good faith in bringing this suit, the appeal appears to be prosecuted in bad faith.

We respectfully contend that the judgment should be affirmed.

Respectfully submitted,

WM. H. NEBLETT,

Attorney for Appellees.



In the United States Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT,

v.

NATIONAL WHOLESALERS, A CORPORATION; M-D PARTS
MANUFACTURING COMPANY; NATIONAL PARTS COM-
PANY; AND HENRY MEZORI, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL
DIVISION

REPLY BRIEF FOR APPELLANT

WARREN E. BURGER,
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**In the United States Court of Appeals
for the Ninth Circuit**

No. 14692

UNITED STATES OF AMERICA, APPELLANT,

v.

NATIONAL WHOLESALERS, A CORPORATION; M-D PARTS
MANUFACTURING COMPANY; NATIONAL PARTS COM-
PANY; AND HENRY MEZORI, APPELLEES

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL
DIVISION*

REPLY BRIEF FOR APPELLANT

A substantial portion of appellees' brief (pp. 2-5, 22-23) is devoted to a challenge to the personal probity of the counsel representing the Government in this litigation. We do not deem appellees' statements in this connection to be worthy of any response. At the same time, a summary consideration of those portions of appellees' brief which are addressed to the merits of the appeal may serve to clarify the issues before this Court.

1. Appellees assert (Appellees' Brief, pp. 8 *et seq*) that the allegations of the Government's complaint do not set forth the circumstances constituting appellees' fraud with the particularity required by Rule 9(b)

of the Federal Rules of Civil Procedure. Even a cursory examination of the complaint will reveal, however, that it alleges, in abundant detail, every essential element of a cause of action grounded upon fraud. See *Pence v. United States*, 316 U. S. 332, 338.

Specifically, the complaint alleges that the Government entered into a contract with appellees which, as appellees were aware, called for the delivery of genuine Delco-Remy regulators (Par. VIII-IX, R. 5-6). Instead of then delivering genuine Delco-Remy regulators, appellees deliberately substituted other and inferior regulators and parts of their own assembly and manufacture (Par. XIII, R. 8).¹ They also clandestinely purchased Delco-Remy nameplates and placed them on the delivered regulators with the intent of inducing the Government into believing that genuine Delco-Remy regulators were being supplied (Par. XIII, R. 8-9). By reason of the foregoing, the certifications in the invoices that all conditions of purchase had been complied with were false, fictitious or fraudulent (Par. XIV, R. 9). The Government made payment to appellees in reliance upon the false claims and was damaged thereby (Par. XV, R. 9).

2. Appellees' contention (Appellees' Brief, p. 8) that the record does not reflect any misrepresentations on their part is equally baseless. First of all, the record shows that appellees expressly represented in their bid both that they would furnish genuine Delco-Remy regulators and that they were a dealer in, not a manufacturer of, regulators (S. R. 294-295). Secondly, by placing a counterfeit Delco-Remy nameplate

¹ Contrary to appellees' belief (Appellees' Brief, p. 9), whether one item is inferior to another is a factual matter.

on each of their own regulators prior to its delivery to the Army (R. 33, 183), they implicitly represented that these regulators were of Delco-Remy manufacture. Finally, in each invoice they described and certified the supplied items as being genuine Delco-Remy regulators (R. 103).

It is interesting to note that, while appellees complain of the characterization of their dealings with the Government as dishonest (Appellees' Brief, p. 2), at no place in the brief do they endeavor to explain why they (1) surreptitiously acquired the Delco-Remy nameplates; (2) placed these nameplates on the delivered regulators, which they in fact had assembled themselves; (3) stated in their bid that they were "Bidding DR-1118502" (the genuine Delco-Remy regulator); and (4) carefully avoided the use of the words "or equal" in the preparation of the invoices accompanying the shipment. Instead, appellees seemingly remain content to rest on the excuse (Appellees' Brief, p. 5) that the Delco-Remy regulator is not patented and is manufactured for Army use exclusively.

Even if this is true, it is difficult to see its materiality. This action, of course, is not grounded upon patent infringement. Rather, the gravamen of the complaint is that appellees had supplied to the Army something other than that which they had certified they were supplying (as well as had contracted to deliver) and further that, in doing so, they had concealed the substitution by resort to the device of false labelling.²

² That this is, as we suggested in our main brief (p. 11), a recurring technique of the defrauder is pointed out in a recent article dealing with the subject of the palming off of mislabelled substitutes for items manufactured by concerns with nation-wide reputations. See Frank, *Do You Know What You Are Buying?*, Saturday Evening Post, July 9, 1955, p. 28.

Whether the model DR-1118502 Delco-Remy regulator was patented at the time or not, appellees plainly had no license to engage in such deceit; the obligation of honesty is certainly not restricted to suppliers of patented items.

3. Appellees contend in effect (Appellees' Brief, pp. 15-16) that the District Court's finding that no fraud has been committed by them is not subject to any appellate review whatsoever. In support of this novel and startling proposition, they cite (Appellees' Brief, p. 16) four decisions of the Eighth Circuit. None of these decisions, however, purport to, or indeed could, disturb the force of the provision of Rule 52(a) of the Federal Rules of Civil Procedure that findings of fact "shall not be set aside *unless clearly erroneous*" (emphasis supplied). As set forth in the specifications of error (Appellant's Brief, pp. 9-10), it is the Government's position that the District Court's findings bearing on the question of fraud are "clearly erroneous"; that a review of the entire record will leave "the definite and firm conviction that a mistake has been committed." *United States v. Gypsum Company*, 333 U.S. 364, 395. Cf. *United States v. Comstock Extension Mining Co.*, 214 F. 2d 400 (C.A. 9).

Moreover, we think it should be noted that the District Court's ultimate findings in regard to fraud were not founded upon its resolution of conflicting evidence. Instead, as is pointed out in our main brief (pp. 14 *et seq.*), underlying these findings was the court's preliminary determination that appellees' contract with the Government permitted the delivery of "or equal" regulators in lieu of Delco-Remy regulators. Questions of contract interpretation, especially where (as here) no

parol evidence is involved, are questions of law and not of fact. *United States v. Lundstrom*, 139 F. 2d 792, 795 (C.A. 9).

Appellees do not take issue in their brief with our analysis (Appellant's Brief, pp. 14-16) of the provisions of the contract, which analysis compels the conclusion, we submit, that the contract called for the delivery of Delco-Remy regulators "without substitution of any kind." Nor, we emphasize again, have they ever given any reason respecting why, if they believed that the contract permitted the delivery of "or equal" regulators, they nevertheless went to such considerable lengths to conceal the fact that the supplied regulators were assembled by themselves and contained non-Delco-Remy parts. Similarly, they conveniently ignore Mezori's concession at the trial (R. 270) that the contract called for the same regulators as had been delivered to the Army under a previous contract—which regulators had been of Delco-Remy manufacture.

What appellees fall back on again is the bald assertion (Appellees' Brief, pp. 17-18) that the Contracting Officer "decided" that the 4,086 regulators in issue here complied with the specifications of the contract. As the portion of the Contracting Officer's letter quoted in our main brief (pp. 20-21) shows, however, this assertion is without substance. The Contracting Officer made it perfectly clear in this letter that, in his view, the contract called for Delco-Remy regulators and that the 4,086 regulators had been accepted by the Army, upon tender, in the belief that they were Delco-Remy.

4. Appellees do not, and in light of the holding in *United States ex rel Marcus v. Hess*, 317 U.S. 537 (see Appellant's Brief, pp. 27-28) cannot, dispute that the

recovery of the \$2,000 statutory forfeiture for each false claim is not dependent upon a showing of actual, ascertainable damage. Thus, as we urge in our main brief (pp. 22-30), the United States was entitled to recover the statutory forfeitures simply on its showing that appellees knowingly substituted their regulators for the Delco-Remy regulator specified in the contract and that they delivered and certified them to the Army as being Delco-Remys. The Government was not obligated to show that appellees' substitute was inferior to the item it was represented to be.

But the Government made such a showing through the testimony of appellees' subcontractors and of an expert witness (see Appellant's Brief, pp. 7-8). Appellees made no effort at trial, by cross-examination or otherwise, to controvert the expert's opinion that the non-Delco-Remy hinges and insulating plates used in appellees' regulators were decidedly inferior to their counterparts in the genuine Delco-Remy. Nor do they advance any such suggestion in this Court.

Appellees' insistence here, as in the court below, is instead (Appellees' Brief, pp. 17-19) that Article 14 of the contract (the "disputes clause") precluded the showing of inferiority. Additionally, they rely on 41 U.S.C. 156 for the same proposition.

The reasons why Article 14 is not applicable are detailed in our main brief (pp. 32-35) and need not be set out again here.³ And, insofar as 41 U.S.C. 156 is con-

³ Appellees do not discuss these reasons in their brief. They do quote (Appellees' Brief, p. 20) from a colloquy between the court below and government counsel in which the latter stated that he did not intend to "impeach" the determination of the Contracting Officer. But this hardly assists them. For, the single determination that the Contracting Officer made was that the *balance* of the regulators (which are not in issue here) would be accepted on an

cerned, in terms it attaches finality solely to the determinations and decisions which under the provisions of the Armed Services Procurement Act of 1947, 62 Stat. 21, 41 U.S.C. 151-161, are to be made by the agency head. We see nothing in the Act requiring determinations by agency heads in respect to the quality of items delivered under a Government contract. To the contrary, the Act is primarily, if not exclusively, devoted to matters relating to contract procurement.⁴

"or equal" basis, even though the contract specified Delco-Remy regulators (see Appellant's Brief, pp. 20-21, 34). That government counsel did not regard the Contracting Officer's letter as having any bearing upon the regulators previously delivered is seen from his statement to the court, immediately following the quoted colloquy, that he intended to prove that these regulators were defective and inferior (R. 118-119).

⁴ The cases cited by appellees on pages 18 and 19 of their brief, with the exception of *Kihlberg*, *Moorman*, and *Wunderlich* which we treat in our main brief (pp. 32 *et seq*), are not in point. Whatever, for example, may be the finality attaching to determinations by the Secretary of the Interior on matters concerning the administration of public lands (*DeCambra v. Rogers*, 189 U. S. 119), contracting officers' determinations are final only if they come within the ambit of the disputes clause. And, even then, there is substantial doubt whether the disputes clause may be invoked in an action for fraud (see Appellant's Brief, p. 35).

Insofar as appellees' complaint regarding the seventh specification of error is concerned, while the court below first excluded the Government's evidence on the composition of the delivered regulators, it later reversed itself and admitted it; although refusing, erroneously we believe, to consider at all the question of inferiority. In the circumstances, we did not believe the second sentence of Rule 18(d) of this Court to be applicable. If we were wrong in this belief, we regret the omission but call the Court's attention to the fact that the information called for by the Rule does appear on pages 7 and 8 of our main brief.

CONCLUSION

For the reasons above stated, and those contained in our main brief, we respectfully submit that the judgment below should be reversed.

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United States Attorney.

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ALAN S. ROSENTHAL,
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Department of Justice.

AUGUST, 1955.

No. 14,692

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

NATIONAL WHOLESALERS, a corporation, M-D PARTS
MANUFACTURING COMPANY, NATIONAL PARTS COM-
PANY and HENRY MEZORI,

Appellees.

APPELLEES' PETITION FOR REHEARING.

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PANY and HENRY MEZORI,

Appellees.

APPELLEES' PETITION FOR REHEARING.

Pursuant to Rule 23, the appellees, defendants in the lower court, petition this Honorable Court, the Honorable James Alger Fee, the Honorable Richard H. Chambers, Circuit Judges, and the Honorable Roger T. Foley, District Judge, to grant a rehearing of the decision of this Court rendered September 18, 1956, reversing the judgment of the District Court made in favor of the defendant appellees, and reported in 126 Fed. Supp. 357.

The Grounds Upon Which Petitioners Seek a Rehearing.

1. The decision is in direct conflict with two recent cases decided by this Court, *Lindsay v. U. S.* (C. A. 9, 1950), 181 F. 2d 582, and *United States v. Looney* (C. A. 9, 1955), 226 F. 2d 144, which followed the rule laid down by *United States v. Moorman* (1950), 338 U. S. 457, 70 S. Ct. 288. The *Lindsay* and *Looney* cases are not mentioned in this Court's opinion herein.

2. The courts have no power to review or to set aside the decision of the Secretary of the Army or his duly authorized representative, in this case the contracting officer for the Secretary of the Army, made pursuant to Armed Services Procurement Act of 1947, Public Law 413, 80th Congress, Title 41 U. S. C. Sections 151-161, unless fraud or mistake so gross as to imply bad faith upon the part of the contracting officer enters into his decision.

3. The courts have no power to review or to set aside the decision of a department head or his duly authorized representative, in this case the contracting officer for the Secretary of the Army, made pursuant to the standard dispute clause incorporated in the contract in suit, unless fraud or mistake so gross as to imply bad faith on the part of the contracting officer enters into his decision.

4. The Government cannot maintain any sort of action to override the decision of a duly authorized contracting officer for the Secretary of the Army made pursuant to Armed Services Procurement Act of 1947 or pursuant to the standard dispute clause contained in all contracts for Army supplies without alleging and proving fraud on the part of the contracting officer or mistake on his part

so gross as to imply that bad faith entered into his decision.

5. The courts have no power to revise a contract made by a contracting officer for Army Ordnance who has been duly authorized by the Secretary of the Army to make the contract pursuant to the authority granted by Armed Services Procurement Act of 1947, 41 U. S. C. Sections 151-161.

6. The contracting officer for Army Ordnance, duly authorized to do so by the Secretary of the Army, had authority to modify the contract so as to qualify as "or equals" the regulators already delivered when the dispute arose and to direct the completion of the contract by the delivery of the same type, kind and labeled regulator.

7. The regulator generator assembly delivered to Army Ordnance by the contractor, appellee National Wholesalers, was not a proprietary article belonging to the Delco-Remy Division of General Motors, and this Court's holding as a matter of law that it was such a proprietary article added an additional requirement to the contract which was not included therein.

8. The finding of the District Court on substantial evidence that the defendant appellees committed no fraud of any sort in the transaction precludes the holding that defendant appellees did, as a matter of law, file false claims against the Government within the meaning of the False Claims Statute.

9. The uncertainties in the contract for the regulator generator assemblies on the form prepared by Army Ordnance should be interpreted against the Government.

10. Fraudulent intent of the contractor is an essential element to a recovery by the Government of the penalties prescribed under the False Claims Statute.

ARGUMENT.

I.

Without Alleging and Proving Fraud or Such Gross Mistake as to Imply Fraud Upon the Part of the Secretary of the Army or His Duly Authorized Representative Entering Into a Decision, the Government Is Not at Liberty to Attack Judicially or Administratively a Decision of a Duly Authorized Contracting Officer Made Pursuant to the Authority Granted in Armed Services Procurement Act of 1947, 41 U. S. C. Sections 151-161.

This Court says on page 9 of its opinion that there is some strength in the argument that, when the contracting officer qualified the regulator as an "or equal," he made a determination of fact binding upon the Government. This Court, however, was of the opinion that the letter of October 16, 1950, was not such a decision and says that, if the contractor's decision was such a determination, the law of the Ninth Circuit is against the defendants, citing *United States v. Lundstrom* (C. A. 9, 1943), 139 F. 2d 792. It is important to note here that the *Lundstrom* case was decided four years prior to the adoption by The Congress of Armed Services Procurement Act of 1947, Title 41, U. S. C., Sections 151-161 (S. R. 286), under which the contract for the 6600 voltage regulators was made, April 1, 1950.

The *Lundstrom* case was an action by the contractor for the reasonable value of its services performed under a Government contract. The Court says that the *Lundstrom* case is somewhat weakened by *United States v. Moorman* (1950), 338 U. S. 457, 70 S. Ct. 288. In the *Moorman* case the Supreme Court held that the decision of a contracting officer on the question of whether or not work had

been done outside of the requirements of the contract was a dispute which, when settled by the contracting officer under the standard dispute clause, could not be questioned in the courts.

We contend here that the tests of the regulator made by the Detroit Arsenal and the decision made by the contracting officer based upon those tests was a decision of questions of fact. In any event, the things decided here were certainly more nearly questions of fact than the determination of whether or not certain work, as in the *Moorman* case, was within the requirements of the contract, which would appear to be more of a question of law than the dispute involved here as to whether or not the 6600 regulators furnished to Ordnance by the contractor were inferior and failed to comply with contract specifications.

It is interesting to note how other Circuits have treated the *Moorman* case. One of the late cases from another Circuit is *Wildermuth v. U. S.* (C. A. 7, 1952), 195 F. 2d 18, where the Court, after considering the law on subjects analogous to the ones here presented and citing cases which take us over a period of more than 75 years, held:

“However, if we are to give significance to the *Moorman* case, it appears inescapable that whatever doubt may have lingered in prior Supreme Court decisions, all questions are banished by the clear-cut terms of *Moorman*. It stands unequivocally for the proposition that today, if not before, parties to a government contract can validly provide that all disputes, whether they be of law or fact, be decided by one of their group, and that such a decision is, by the terms of this contract, ‘final and conclusive.’ ”

Two recent cases decided by this Court, which are not mentioned in the opinion, are *Lindsay v. U. S.* (C. A. 9, 1950), 181 F. 2d 582, and *United States v. Looney* (C. A. 9, 1955), 226 F. 2d 144. The *Lindsay* and *Looney* cases follow the doctrine of the *Moorman* case and in our view reveal the error of this Court in holding that the contracting officer's determination could be ignored, without the Government pleading and proving fraud or some overreaching on the part of the contracting officer in making the decision declaring the 6600 regulator generator assemblies furnished Ordnance under the contract fitted exactly the specifications set out in the contract.

The *Lindsay* case, in which it was held that the *Moorman* case was controlling, was based on facts analogous to those of the *Lundstrom* case. This Court said in the *Lindsay* case that the District Court was right in confining the evidence to the question of the contracting officer's fraud or gross mistake on his part implying bad faith. The decision of the contracting officer was made under the standard dispute clause in that contract.

The *Lundstrom* and the *Looney* cases were both brought under the Tucker Act. The facts in both cases are quite similar. The decisions cannot be reconciled. The decisions appear to be opposites of each other. In the *Looney* case it was held that the Government and the contractor had agreed that "the contracting officer should have final say in the interpretation of the specifications." The contracting officer decided the dispute in favor of the Government and against the contractor. The District Court overturned the contracting officer's decision. This Court reversed the District Court, citing the *Moorman* and other cases to sustain its decision and held that the decision of the contracting officer on the interpretation of the specifica-

tions was final and bound the contractor. Nothing more was done here by Army Ordnance than to interpret the specifications by determining from the tests made that the 6600 regulators fitted like a glove the specifications in the contract of April 1, 1950, contained in the item description on page 295 of the supplemental record.

The *Moorman* case was said by this Court to be controlling authority for the Court's holding in the *Looney* case, as the Supreme Court had analyzed a similar dispute over the "interpretation" of a contract and held the contracting officer's decision, absent fraud or gross mistake implying fraud, to be final and not within the reach of the courts.

The *Lindsay* and the *Looney* cases are not only in accord with the decisions of the Supreme Court but those decisions are also in line with the decisions of the other Circuits among which there seems to be no conflict. An interesting case is *National Labor Relations Board v. Volney Felt Mills, Inc.* (C. A. 6, 1954), 210 F. 2d 559, citing *United States v. Wunderlich*, 342 U. S. 98, 72 S. Ct. 154, and *United States v. Moorman*, 338 U. S. 457, 70 S. Ct. 288, to the point that fraud will not be inferred and in the absence of fraud of the Government officer making the decision and in the absence of such gross mistake on his part as would necessarily imply bad faith or failure to exercise an honest judgment, a government contract committing final decision to an administrative officer with the right of appeal to the head of an agency, may not be set aside or repudiated.

This Court recognizes the above principle as stated in the *Volney Mills* case but indicates that the test of the regulator generator assembly as well as the decision of the contracting officer were limited in scope and not well rea-

soned or determinative of the dispute presented to the contracting officer. We respectfully contend that this was an erroneous approach by the Court. The authorities here cited and the new Armed Services Procurement Act of 1947, 41 U. S. C., Sections 151-161, under which the contract was made, remove from the courts the authority to overthrow a contracting officer's decision, unless fraud or gross mistake enters into his decision. (*Sunroc Refrigeration Co. v. U. S.* (U. S. D. C. Pa., 1953), 104 Fed. Supp. 131.)

We do not believe that sufficient consideration was given by the Government to the Armed Services Procurement Act of 1947 when it brought this suit. The Government, with the apparent design of escaping the certainty of a dismissal of the complaint on motion, omitted all reference to the test of the regulator and to the decision of the contracting officer. The Government must have known that the test of the regulator, made by Detroit Arsenal and the decision of the contracting officer pursuant to the authority granted him by Section 156(a) of 41 U. S. C., was final under the provisions of subdivision (c) of Section 156. Under this congressional grant of authority the contracting officer had the power to make, or to modify, or otherwise to change the contract in his discretion, and that discretion is not subject to judicial review. (*United States v. Binghampton Construction Company* (1954), 347 U. S. 171, 177, 74 S. Ct. 438, 441, and *De Cambra v. Rogers* (1903), 189 U. S. 119, 23 S. Ct. 519, 521.)

On the question, that the contracting officer's decision and the test made by Ordnance may have fallen short of what might have been required by a court in similar circumstances, a good statement is found in the case of *National Labor Relations Board v. Air Associates, Inc.* (C. A. 2, 1941), 121 F. 2d 586, 591, citing eight decisions of the Supreme Court to support the holding of the Second Circuit in that case, that the Supreme Court has during a period of more than thirty years found it both an impractical and an unwise judicial undertaking to probe the mental processes of officials engaged in reaching decisions pursuant to statute on the face of the evidence presented to them. Statutory authority for the contracting officer's decision made in the present case is found in Armed Services Procurement Act of 1947, 41 U. S. C. Sections 151-161.

This Court says that the contracting officer's decision qualifying the regulator as an "or equal" may be questioned because the procedural requirements of the contract (S. R. 292) were not observed by the contractor or the contracting officer. We contended in our briefs that this procedural requirement could, in the discretion of the contracting officer, be waived. It was held in *Service v. John Foster Dulles, Secretary of State* (U. S. C. A. D. C. (June 14, 1956), 235 F. 2d 215), that the discharge by the Secretary of State of a State Department employee under authority granted the Secretary by statute cannot be questioned in the courts, although the Secretary failed to follow the procedural requirements of an executive order of the President.

II.

The Regulator Generator Assembly Was Not a Proprietary Item.

This Court seems to have founded its reversal of the judgment upon its opinion that the contract required the contractor to furnish the proprietary Delco-Remy regulator and nothing else. The record shows that the regulator was not a proprietary item. Webster's Unabridged Dictionary defines a proprietary item as:

“One who has exclusive title to and in; one who possesses the dominion, or ownership, of a thing in his own right; a proprietor; owner. A body of proprietors; property owners collectively. Right of property; ownership; proprietorship. Made and marketed by a person or persons having the exclusive right to manufacture and sell, such as a proprietor.”

If the regulator had been a proprietary item, Army Ordnance would not have had the right to submit bids on such a proprietary article to 56 approved bidders and to receive and consider 21 bids for the 6600 regulators (S. R. 285). The contract was awarded to the lowest bidder, appellee National Wholesalers. Reference is here had to the lower court's opinion, made a part of its findings of fact [R. 52] and reported in 126 Fed. Supp. 357. In its opinion the District Court considered the Government's claim of fraud in the invoices and showed how there could be no fraud arising out of the labeling. The lower court further found in effect in Finding IX [R. 51] that the regulator was not a proprietary article but was owned by Army Ordnance which could buy it from any person who was able to furnish it. That finding is sustained by the call for bids from 56 dealers and the processing of 21 bids received. The call for bids

from 56 firms and the processing of the 21 bids received is conclusive evidence that the Government considered that it owned the proprietary rights to the regulator. At least the Government is bound by its acts so made with full knowledge of what its rights of ownership of the regulator were. Whatever uncertainties which were thus created or which appear in the contract must be construed against the Government. (Opinion of the District Court, Dec. 1, 1954, 126 Fed. Supp. 357; *Reconstruction Finance Corp. v. Sullivan Mining Co.* (C. A. 9, March 5, 1956), 230 F. 2d 247, 250.)

III.

Furnishing of Inferior War Material Which Does Not Measure Up to the Specifications Provided in the Contract Does Not Authorize an Action for Recovery of the Penalties or Damages Provided in the False Claims Statute.

The contracting officer, who, we contend, had the sole right of decision herein, held that, if the regulator were found from the test to be inferior, the Government would have the right to cancel the contract. The contracting officer said in effect in his written decision that the furnishing of a regulator of the contractor's manufacture would have entitled the Government to cancel the contract, if it had been found from the test that the regulator did not measure up to Ordnance print numbers (Ord. 7069022, Ord. 7069023 and Ordnance Stock No. 2580-118502) which was Ordnance's designation on its prints describing the regulator otherwise known as DR-1118502, GM-118502, IHC-50301-R-1. If it had been determined by the Government test that the regulator was inferior to the one contracted for under the Ordnance print and stock numbers, the Government would have cancelled the contract

and recovered the damages it had suffered. There was nothing more the Government could do. The Government had the right to terminate the contract (Par. 24, S. R. 289) whenever it suited its convenience to do so. The making of inferior war material which fails to measure up to the standard provided by a Government contract does not authorize an action for recovery of the penalties or damages provided in Section 231, 31 U. S. C. (*Hillgrove v. Wright Aeronautical Corp.* (C. A. 6, 1945), 146 F. 2d 621, 622, and *United States v. U. S. Cartridge Co.* (E. D. Mo. 1950), 95 Fed. Supp. 394, affd. (C. A. 8, 1952), 198 F. 2d 456, cert. den. (1953), 345 U. S. 910, 73 S. Ct. 645.)

It was known to the trade and to the 56 approved bidders to whom the 6600 regulators were submitted for bids that the numbers under the item description in the contract (S. R. 295) were all descriptive of the same article, and that the regulator was owned by Ordnance, and designated under its print Nos. 7069022 and 7069023 and its stock No. 2580-118502. It will be observed that the Government's complaint for recovery of the \$2,000 as a penalty on each of the invoices presented is based solely upon the allegation that the voltage regulator was inferior to the one contracted for. Whether or not the voltage regulator was inferior was purely a question of fact resolved in the contractor's favor by the contracting officer for Ordnance under the dispute clause contained in the contract. The decisions of *Moorman* and *Wunderlich*, *supra*, and the decisions of this Court in *Lindsay v. U. S.* and *United States v. Looney*, *supra*, are controlling on the point that no case has or can be made against the defendant appellees without alleging and proving fraud or gross mistake of the Government's contracting officer entering into his decision.

IV.

**Fraud Is a Question of Fact, Not a Matter of Law.
Fraud Is Never Presumed; It Must Be Specifically
Alleged and Clearly Proved.**

The Government's complaint by-passes the only sort of fraud which can be urged in a case of this sort. The Government must have known when it filed the complaint that there was no way to make a case against the defendants under the False Claims Statute without first getting the tests and the decision of the contracting officer out of the way. The Government came in the back door to allege fraud of the contractor in furnishing an inferior article to the Government, which the contractor was alleged to have mislabeled in order to cover up from Ordnance the inferior character of the 6600 regulators. The tests and the decision of the contracting officer for the Government were not mentioned in the complaint. The District Court found pursuant to the agreed issues in the pretrial stipulation that the contractor committed no fraud of any kind. [Findings VI, VII, VIII and IX, R. 50-51].

In the pretrial stipulation it is said at page 36 of the Record:

“Facts to Litigated

I.

“Whether the defendants conspired to defraud the United States, and to present false claims.

II.

“Whether the defendants knowingly and *with intent to deceive the United States* delivered regulators not in conformity with the contract, and, in so doing placed on such regulators a Delco-Remy name plate, imprint, and scroll.” (Italics ours).

After the pretrial stipulation was filed the District Court held certain pretrial proceedings and at the trial took

testimony aggregating some 258 pages on the question of fraud and found on this evidence that there was no fraud as alleged in the complaint [Finding VII, R. 50], and that no false claims had been made by the defendant appellees.

The question of intent on the part of appellees to file false claims, which is discussed at some length in the opinion, seems to be unnecessary in view of the District Court's finding that there was no fraud. If there was no fraud, naturally there could be no intent to commit fraud. It is believed that this Court's decision holding as a matter of law that there was fraud herein is in conflict with the recent decisions of this Court in *Carr v. Yokohama Specie Bank, Ltd.* (C. A. 9, 1952), 200 F. 2d 251, 254-255, and *Paramount Pest Control Service v. Brewer* (C. A. 9, 1949), 177 F. 2d 564, 567, and also in conflict with the decisions of the Supreme Court in *United States v. Chemical Foundation, Inc.* (1926), 272 U. S. 1, 14, 47 S. Ct. 1, 6, and *United States v. Wunderlich, supra*, and *United States v. Colorado Anthracite Co.* (1912), 225 U. S. 219, 226, 32 S. Ct. 617, 620.

The alleged fraud pled in the complaint that the contractor furnished an inferior item not called for by the contract is all immaterial. In September, 1950, at the time that Ordnance ordered delivery of the regulators stopped until tests were made, Ordnance referred the whole matter to the United States District Attorney at Los Angeles. The then District Attorney had the F.B.I. make a complete investigation of the contractor and the methods used in furnishing the regulators [R. 255-262]. Pursuant to that investigation and the tests made, the decision of the contracting officer was rendered directing the contractor to deliver the balance of the regulators, which was done. There is no other assumption possible

than that the District Attorney at the time, September 1950, considered that there was no cause of action under the False Claims Statute. No more was heard of the subject until nearly three years later when the complaint was filed on July 3, 1953, charging the defendants with fraud in the invoices for the regulators delivered after the contractor's decision as well as those which went before.

The only kind of fraud which could have been pled and proved and which the decisions of the Supreme Court and of the Circuits including the Ninth, recognize as being material to a case of this kind is that of the contracting officer making the decision, or such gross mistake on his part as would necessarily imply bad faith or failure to exercise an honest judgment. (*United States v. Moorman*; *United States v. Wunderlich*; *Lindsay v. U. S.* and *Looney v. U. S.*, *supra*). As said before, the decision of the contracting officer was by-passed by the Government which brought the suit in order to reach the matter in a way which has been condemned by the Supreme Court of the United States from the time of *Kihlberg v. U. S.*, 97 U. S. 398, 402, 24 L. Ed. 1106, decided in 1878, 78 years ago.

Petitioners respectfully request that a rehearing be granted.

WM. H. NEBLETT,

Attorney for Appellees, Petitioners Herein.

I, Wm. H. NEBLETT, attorney for the appellees, petitioners herein, certify that in my judgment the foregoing petition for rehearing is well founded and that it is not interposed for delay.

WM. H. NEBLETT.



